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THE

PUNJAB RECORD,

OR

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inasmuch as all the above-specified acts took place *after* the sale, plaintiffs were not thereby estopped from attacking the said transfer as they had not by any such act misled the defendant or induced him to enter into the sale transaction.

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continuance of the mortgage, and that, therefore, the burden of proving that his possession was adverse as against the mortgagor no less than as against the mortgagee rests upon such third party.

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Held, in accordance with the principle laid down in *Lopez' case* (5 B. L. R., 521), that inasmuch as the site of the land in question had been duly identified as plaintiffs', the latter were entitled to succeed, and that the mere facts that they did not follow the land when it went to the Muzaffargarh side, and that the defendants had brought a few scattered plots thereof under cultivation, did not affect plaintiffs' rights as owners of the site.

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" " " *Civil Procedure Code, 1882, Sections 375, 622—Offer made by defendant pendente lite to settle case—Compromise—Decree based on plaintiff's acceptance of offer repudiated by defendant—Appeal—Revision.—See Civil Procedure Code, 1882, Section 622.*

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" " " *Pre-emption—Conditional decree—Payment of purchase money—Appeal—Decree of Appellate Court confirming decrees of first Court, but silent as to time for payment of purchase money.—See Pre-emption, No. 10.*

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Held, that inasmuch as the case had been remanded by the Chief Court merely in order to give plaintiff an opportunity of proving that his alleged agent was duly authorized to institute the suit, the lower Appellate Court should have held, on plaintiff's default, that the previous order of the Divisional Court stood.

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" *Promissory Note—Consideration—Inequitable bargain.*—See *Promissory Note.*

" *Punjab Courts Act, 1884, Section 40 (i), (ii)—"Point of law involved"—Question as to burden of proof—Separation deed between husband and wife—Allegations of misconduct on part of wife—Revision—Civil Procedure Code, Section 622.*—The Divisional Judge granted a certificate of appeal, under Section 40 of the Punjab Courts Act, to the effect that "a question of law is involved, namely, whether a child born in the lifetime of its father is not presumed to be a legitimate

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"one, and whether the *onus probandi* was not on the defendant-appellant to prove the unchastity of his wife, and whether it is not a "question of 'no proof' about the finding of unchastity of the plaintiff-respondent, and that the case is, in my opinion, of sufficient importance to justify a further appeal."

Held, that the certificate on the question of *onus probandi* and the mode of decision was not one contemplated in the Act, and was bad.

Semle : The right construction of the word "involved" is that it applies to the case rather than to the appeal which is to be certified under sub-section (i) (d), or admitted under sub-section (ii) of Section 40 of the Act, and includes points which may be raised by way of defence in an appeal.

But *held*, that the Divisional Judge had acted with material irregularity, within the meaning of Section 622 of the Civil Procedure Code, inasmuch as (1) he had started a new ground of defence not pleaded by the defendant, *viz.*, that the agreement for separation between the defendant and his wife (the plaintiff) was obtained under pressure, and should not be enforced; (2) he had absolved the defendant from liability, although finding that defendant had committed a breach of the agreement from the beginning; (3) he had wrongly decided the question of *onus* of proof as regards breach of the terms of the agreement, and (4) he had dealt in generalities and conjectures about plaintiff's general bad conduct instead of giving definite finding on the evidence as regards specific misbehaviour on her part.

Although Hindu Law does not recognize divorce, the marriage tie being indissoluble, yet where the finding of a Court, in a suit by the wife for maintenance, would put an end to the plaintiff's conjugal rights, make her an outcast, and probably drive her into the streets for her livelihood, the evidence as to adultery and immorality on her part should be of a definite character as well as cogent and reliable, before the Court acts upon it for the purpose of dismissing her suit.

Section 622 of the Civil Procedure Code lays down the conditions under which the Court may revise the proceedings of subordinate Courts, and its powers of interference is subject to these conditions. But once the jurisdiction to revise is established on any of the grounds specified in the first part of the said section, there is no limitation imposed on the power of the Court as to the mode of disposal. The section is intended to arm the Court with the power of remedying injustice in cases not subject to appeal under certain specified circumstances, and, therefore, when the grounds of jurisdiction are established and a fit case shown for the exercise of its powers, there is nothing in the section to preclude the Court from finally disposing of the case itself because points of fact, and not points of law, are involved.

The Court finding that defendant had entirely failed to prove breach of the conditions of the agreement between him and plaintiff on the part of plaintiff, or that the latter had been guilty of any immorality, set aside the order of the Divisional Court, and restored the decree which plaintiff had obtained in the first Court

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Burden of proof.—*Punjab Courts Act, 1884, Section 40—Questions of law involved—Burden of proof—Construction of deed—Contradictory finding by lower Appellate Court—Material irregularity.*

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Held, that the proper allocation of the burden of proof and the construction of a deed which merely affected the parties to the suit and concerned no one else, were not "questions of law involved in the case" within the meaning of Section 40, of the Punjab Courts Act, 1884.

No. 45, *Punjab Record*, 1894, and No. 68, *Punjab Record*, 1897, followed.

It was further contended, on behalf of appellant, that inasmuch as the Divisional Judge had held that Article 127 of the Limitation Act was applicable to the case, his subsequent finding that the property in dispute was not "joint family property" amounted to an error of law or at least to a material irregularity within the meaning of Section 622 of the Civil Procedure Code.

Held that, even upon the assumption that such findings were erroneous and contradictory, they would not amount to "questions of law involved" within the said section of the Punjab Courts Act.

Held, further, that all that was decided by the Divisional Judge was that if the allegations in the plaint were correct and the property were to be held to be "joint family property, then under these conditions Article 127 of the Limitation Act would be applicable, and that this did not amount to holding that the property was in fact "joint family property," so as to throw the burden of proving that it was not on the other side, or preclude the Court from finding on the merits that it was not in fact "joint family property."

It not being contended that the parties were members of a joint Hindu family, and it being admitted that all the house property other than that in dispute had been partitioned, though some property consisting of agricultural land was still held jointly, *held*, that the burden of proving that the property in dispute was joint family property was at the outset rightly placed on plaintiffs, and that there was nothing in the findings of the Divisional Judge as above explained which shifted the burden to the other side.

Held, therefore, that the Divisional Judge had not acted with material irregularity in dismissing plaintiffs' claim on the ground that they had failed to discharge the *onus* which rested on them

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C.

Cause of Action.—See *Custom II.—Alienation*, Nos. 3, 4, 6 and 8—*Occupancy Rights*, Nos. 2 and 3.

" " " *Civil Procedure Code*, 1882, Sections 19, 43, 45—*Suit for possession of immovable property situate in different districts—Joint suit by reversioners against person in wrongful possession—Misjoinder of causes of action—"Cause of action," meaning of.*

Held, that under Section 19 of the Civil Procedure Code, when immovable properties are situate in several districts, a suit in respect of the whole of the properties can be brought in any one of these districts.

I. L. R., XIV *Cal.*, 661, followed.

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No.

Where on the death of the survivor of two widows, all the reversioners, fourteen in number, brought a joint suit for possession of property which was alleged to be wrongfully withheld from them by the defendant, and which was admittedly undivided.

Held, that though the rights of the plaintiffs might be divisible and have accrued to them undivided on the death of the said widow, the substance to which those rights attached being undivided, plaintiffs' title and property was still joint, and that they were therefore entitled to jointly sue defendant whose wrongful holding of possession of the property was the single act which infringed those rights.

Held, further, that even if the words "cause of action" were construed in the limited sense of including merely the facts constituting the infringement of the right, but not those constituting the right itself, the plaintiffs were nevertheless entitled to sue jointly, as it was the same wrongful act of the defendant which infringed these rights, whether joint or distinct in the property in dispute.

It appeared that during the lifetime of the widows the reversioners had brought several suits for declaratory decrees in respect of various alienations effected by the said widows in favour of the present defendant from time to time, but that they had not sued for certain houses which were now included in their claim.

Held, that inasmuch as the reversioner's right to possession of the houses could not accrue during the lifetime of the widows, their suit for possession thereof on the death of the survivor of the widows, was not barred under Section 43 of the Civil Procedure Code ...

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" " " " *Section 13.*—*Res judicata*—*Cross suits relating to same subject-matter and involving identical issues tried together*—*Findings on issues in both judgments identical*—*Appeal from judgment in one case only*—*Civil Procedure Code, 1882, Section 13.*—Where two cross-suits, relating to the same subject-matter and giving rise to identical issues are tried by the same Court, and it cannot be urged that there is a bar to the trial of the issues by the Court in either case, an Appellate Court is not precluded from adjudicating on those issues, if one judgment is appealed and the other is not, by the operation of the latter judgment under the rule of *res judicata*, though the findings on the issues in both judgments are identical.

I. L. R., XVI Cal., 233, followed; *I. L. R., VI Cal.*, 319, not followed; *I. L. R., XI All.*, 148, distinguished

A decision on a point, which is decided, but which is not necessary for the decision of the suit, which is disposed of on another point, cannot operate as *res judicata*.

Where a plaintiff brought her own suit, in which the question of her right necessarily and directly arose, *held*, that she could not

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be held to have acquiesced in the same issue being treated as a material one in another suit, in the same Court, in which she was impleaded only as a member of the family, the two suits being tried together	31
<i>Civil Procedure Code, 1882.—Section 13.—Res judicata—House and land sold by one deed of sale—Suit in respect of house—Subsequent suit in respect of land—Finding in first suit that deed of sale was void, effect of, as regards subsequent suit.—A. had a decree against B., and in execution thereof attached a house belonging to B., whereupon O. objected that B. had conveyed the house to him by a deed of sale which covered the house in dispute, and also a building site. The objection was disallowed, and C. was referred to a suit which he brought, and in which it was held that the sale by B. to C. was fictitious and in fraud of creditors, and was therefore invalid. Subsequently A. attached the building site, and C. again objected on the same ground as before. The objections having been again disallowed, O. filed the present suit to establish his right to the building site. The question referred to the Full Bench was whether the decision in the first suit as to the validity of the sale was binding on the parties in the second suit.</i>	
<i>Held, by the Full Bench, that though the subject-matter of the second suit was different, in the sense that in the one suit a plot of land and in the other a house was claimed, yet the material issue, whether the sale-deed conveyed a title or was fictitious and fraudulent, was identical in both suits, and that, therefore, the finding thereon in the first suit operated as res judicata, and precluded the issue which it had decided being raised again between the same parties in a subsequent suit, the latter suit being within the jurisdiction of the Court which decided the prior suit</i>	100
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" " " <i>Section 43.—Civil Procedure Code, 1882, Section 43—Application to Revenue Officer for partition of land—Question of title decided by said officer—Subsequent suit for possession of house—Title to land and house identical—Punjab Land Revenue Act, 1887, Section 117.—In previous partition proceedings, relating to certain land and between the parties to the present suit, the Revenue Officer, before whom the proceedings were instituted, passed an order under Section 117 of the Land Revenue Act, to the effect that he would himself inquire into and determine the question of title that had been raised. Subsequently the present plaintiffs filed an application, upon which they paid the full stamp necessary for a civil suit, but which was not in the form of, or verified as, a plaint, and contained no statement of claim beyond a reference to the said order, and a statement that a separate suit would be brought for possession of a house connected with the land. The application was, however,</i>	

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registered in the register of civil suits, the order that it should be so registered and the summons issued being signed by the said officer, who was an Extra Assistant Commissioner, as "Munsif, 1st class." The officer then proceeded under Section 117 (2) (b) of the Land Revenue Act, and gave plaintiff a decree in respect of the land, the judgment being signed by him as "Assistant Collector," and the decree as "Munsif, 1st class." Plaintiffs having subsequently sued for possession of the house mentioned in their said application, defendants pleaded that the suit was barred under Section 43 of the Civil Procedure Code, on the ground that the decree in the partition proceedings had been passed by the Extra Assistant Commissioner, purely in the exercise of his civil powers as a Munsif, 1st class, and that therefore the claim to the house could have been made before him and determined in those proceedings. It was admitted that plaintiffs' title to the land and to the house was the same.

Held, that the Extra Assistant Commissioner had clearly intended in the partition proceedings to act under Section 117 (2) (b) of the Land Revenue Act, as a Revenue Officer, and that his jurisdiction was confined to the question of title to the land which alone was the subject of those proceedings.

Held, therefore, that inasmuch as no claim to the house could have been included in the former proceedings, the present suit was not barred under Section 43 of the Civil Procedure Code

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Civil Procedure Code, 1882, Section 45.—See Cause of Action.

" " " " *Section 53.—Appeal from order of Appellate Court returning plaint for amendment or for presentation to proper Court.—See Civil Procedure Code, 1882, Section 588 (6).*

" " " " *Section 108.—Civil Procedure Code, 1882, Section 108—Money paid into Court—Ex-parte decree upheld—Application by decree-holder for payment of deposit—Execution of decree—Limitation Act, 1877, 2nd Schedule, Article 179.—When a sum of money is paid into Court under Section 108, Civil Procedure Code, in order to be delivered to plaintiffs, should the ex-parte decree be upheld, such sum becomes the decree-holder's money as soon as the ex-parte decree is upheld, and it is not necessary for him to apply for execution of the decree in order to obtain payment of the money.*

Where, therefore, in such a case the decree-holder applied for payment of the deposit more than three years after the decree was passed

Held, that such application could not be considered an application for execution of decree, and was not barred under Article 179 of the 2nd Schedule to the Limitation Act

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" " " " *Section 111.—Partnership—Lien—Contract Act, 1872, Sections 60, 61, 217, 262—Set-off—Civil Procedure Code, 1882, Section 111.—The rule as to the equitable lien possessed by each partner on the partnership property cannot be applied so as to enable a managing partner to appropriate money due to another partner out of the assets of a firm in liquidation of a debt due from that partner to himself and entirely unconnected with the business of the firm.*

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Neither at common law nor in equity is there any right of set-off between parties mutually indebted in the absence of an agreement to that effect. Nor do the provisions of Section 111 of the Civil Procedure Code apply where the debt sought to be set-off was barred by limitation before the suit was filed

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Civil Procedure Code, 1882, Section 130.—Civil Procedure Code, 1882, Sections 130, 136, 138, 139.—Failure to comply with order directing defendant to produce documents by specified date—Defence struck out and case heard ex-parte.—Plaintiff's plaint was filed in the District Court on the 23rd December 1895, and the 9th February 1896 was fixed for defendant's appearance. The latter appeared on the said date, but the case was put off to the 24th February, on which date defendant filed his defence. After several adjournments, issues were drawn and the parties examined on the 2nd April, and at the close of the day's proceeding the District Judge recorded an order to the following effect: "Case for evidence on the 19th and 20th May. "Defendant must file the documents he has in his possession and "copy of his account-book by 5th April." On all the adjourned dates, except one, defendant was present in person in Court.

On the 2nd April plaintiff had a notice served on defendant for the production of his books and certain letters, and on the 9th April defendant gave plaintiff notice under Section 132 of the Civil Procedure Code, offering inspection at a certain place on the 19th. On the 21st April, after inspection by the plaintiff, defendant applied for leave to remove his books to his shop, and on the following day the District Judge gave the required permission. Plaintiff called defendant as his witness for the 19th May, but the notice was returned unserved with the endorsement that defendant had gone away. Thereupon plaintiff's pleader complained that defendant had kept out of the way to evade service, and had not complied with the order of the 2nd April. The Court was, therefore, asked to proceed under Section 136 of the Code, by striking out defendant's defence, and to decide the case *ex-parte*. The Court held that the said order was one under Section 130 of the Code, struck out the defence under Section 136, and after taking some evidence for the plaintiff, decreed the claim in full. The decree having been upheld by the Divisional Court on appeal, defendant appealed to the Chief Court.

Held, that the lower Courts had erred in treating the order of the 2nd April as one passed under Section 130 of the Code, and that the District Court was not justified by defendant's non-compliance with the said order in striking out the defence and deciding the case *ex-parte*.

Section 130 of the Code does not apply to a general direction, without any particular object in view, to a party to produce all documents in his possession by a certain date, and (*semble*) the order therein referred to is meant to be served on the party to whom it is given, and not merely to be verbally announced, so that compliance would depend on his memory or his understanding of it.

Held, further, that even if the order in question had been one under Section 130, it could not be legally given in respect of the copy of de-

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defendant's accounts as they were not in existence, and therefore not in the possession or power of defendant, when it was passed.

Section 136 of the Code requires to be worked with caution and should be made use of only as a last resort, and it is always proper to make the order a conditional one, and to grant a little further time for compliance 58

Civil Procedure Code, 1882—Section 136.—See Section 130, supra.

" " " " *Section 136—"Decree"—Appeal.—An order under Section 136 of the Civil Procedure Code, dismissing a suit, is a decree from which an appeal lies 43*

" " " " *Sections 138, 139.—See Section 130, supra.*

" " " " *Section 230.—Execution of decree—Limitation—Civil Procedure Code, 1882, Sections 230, 235—Limitation Act, 1877, 2nd Schedule, Article 179 (iv).—The decree of which execution was sought, was passed on the 15th July 1880, and an application for execution by attachment and sale of movable property was made on the 27th October 1882, but as no movable property could be found, the proceedings were infructuous and terminated. Subsequently, on the 18th October 1883, on a fresh application for execution, the judgment-debtor was arrested and imprisoned, and a small sum of money was realised by sale of a document. On the 29th January 1884 an application was made for execution by attachment and sale of immovable property of the judgment-debtor. The executing Court dealt with this application as one for a farm of the property, but the error was amended by the Divisional Court on appeal, and proceedings were protracted until, on the 31st October 1891, the Commissioner of the Division refused to sanction sale of the property. On the 31st October 1892 the decree-holder filed an application, setting forth the refusal of the Commissioner to sanction the said sale and his own fruitless endeavours to realise his decree, and praying that the land be sold or a receiver appointed under Section 503 of the Civil Procedure Code. An order for the appointment of a receiver having been made, the judgment-debtor appealed to the Chief Court, and it was contended on his behalf that execution of the decree was barred under the provisions of Section 230 of the Code, and Article 179 (iv) of the 2nd Schedule to the Limitation Act, 1877. It was urged that the application of 1892 was "a subsequent application" within the meaning of the said section of the Code.*

Held, that the said application was merely a petition to the Court, seized of, and already executing, the decree on the application of 1884, to take a step in aid of the execution on that application, and was, therefore, not barred under Section 230 of the Code, which does not apply to applications or petitions asking the Court to give effect to previous petitions still pending.

Held, further, that inasmuch as proceedings in execution had been pending ever since 1884, execution was not barred by reason of "steps in aid of execution" not having been taken every three years ... 40

" " " " *Section 231.—Civil Procedure Code, 1882, Sections 231, 244.—Application for execution of whole decrees by one of several joint decree-holders—Dismissal of application—Appeal.—An application for execu-*

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tion of the whole decree was made, under Section 231 of the Civil Procedure Code, by one of four joint decree-holders, but was dismissed by the District Judge on the ground that the decree could not be executed until all the decree-holders joined in the application. It appeared that the judgment-debtor was not summoned to defend the application, but on appeal from the District Judge's order he was impleaded as well as the other co-decree-holders. The Divisional Judge ordered that the execution should proceed on the applicant joining with him such of his co-sharers as were willing to execute the decree jointly with him, and impleading the rest who objected and declined to take out execution, and that the Court should take possession of the entire land decreed, and separate off the shares of the applicants from those of the others through the agency of the Collector. The judgment-debtor appealed to the Chief Court, and it was contended on his behalf that the order of the District Judge under Section 231 of the Code was not appealable, and that, therefore, the order of the Divisional Judge was without jurisdiction and void.

Held, following *J. L. R., XVII Mad.*, 394, that the Divisional Judge had jurisdiction to hear the appeal.

Although, if an application under Section 231 of the Code is dismissed without summoning the judgment-debtor or issuing process, and the latter is not made a party to the appeal, the question may be one beyond the province of the Appellate Court to adjudicate upon, yet if, as in the present case, the judgment-debtor is impleaded on the appeal, the question then becomes one under Section 244 of the Code, and an appeal lies.

The Court refused, under the circumstances of the case, to interfere with the order of the Divisional Judge on the merits

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Civil Procedure Code, 1882, Section 235.—See Section 230, *supra*.

" " " " Section 244.—See Section 231, *supra*.

" " " " Section 244.—Decree for pre-emption—Question whether decree-holder has paid money into Court within time.—On the 19th May 1897, Hyat obtained a decree against Saghar Mal, vendee, for pre-emption of certain land, and it was ordered that on payment by him of Rs. 2,000, purchase-money, by the 28th June 1897, for payment to Saghar Mal, vendee, together with Rs. 29, cost of sale-deed and registration, he should be put in possession of the land, and that, in default of deposit of the said sums, the decree should become void. The decree holder, by mistake, paid into Court only Rs. 2,000, by the 28th June, and on the 1st July the vendee submitted an application urging that the decree had become void in consequence of the failure of the decree-holder to pay in the whole amount specified in the decree. This application having been rejected, the judgment-debtor (vendee) appealed to the Divisional Judge, but his appeal was dismissed on the ground that no appeal lay.

Held, that the question whether the purchase-money had been deposited in time was one arising between the parties to the suit, in which the decree was passed, and relating to the execution thereof, within the meaning of Section 244 of the Civil Procedure Code.

Held, therefore, that an appeal lay to the Divisional Judge from the order rejecting the application

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*Civil Procedure Code, 1882, Section 263.—Sale of residential house by one of four Hindu co-sharers—House occupied by tenant—Right of vendee to joint physical possession—Civil Procedure Code, 1882, Section 263.—*Appellant purchased from one of four Hindu brothers his share, being one-fourth of a dwelling-house, in the Civil Lines, Rawalpindi, which had for some years previously been rented, for residential purposes, by the Political Officer for the time being with *Sardar Aynb Khan*. It appeared that the appellant wished to occupy the whole house, and purchased the share of his vendor, but was unable to come to terms with the three other co-sharers. The respondent, tenant of the house, originally from all the four co-sharers, and finally from three of them, having refused to vacate any part of it, appellant filed a suit against him and his three lessors for "joint possession of one-fourth share of the said house, Rs. 260 arrears of rent and costs," and on the 19th November 1897 obtained a decree against respondent "for possession of a joint quarter share, and for Rs. 60 rent and for costs." Subsequently appellant applied for execution of the said decree, and prayed that "possession of a one-fourth share of a house situate in the Civil Lines, in which the judgment-debtor lives, be given." This application having been dismissed on the ground that an order for physical possession, if passed, could not be carried out, having regard to the fact that the respondent was in possession as tenant of a majority of the co-sharers, the decree-holder appealed to the Chief Court.

Held, that appellant having confined his application to physical possession of the house in suit, and having refused to accept possession through receipt of rent, the application had been rightly rejected, on the ground that the house having been enjoyed by the co-sharers only through receipt of rent, it was not open to one co-sharer to transfer to his vendee the right to interfere with the rights of the other co-sharers in such a manner as to deprive them of the enjoyment of their shares in the joint property

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" " *Section 274.—Civil Procedure Code, 1882, Sections 274; 276—Validity of attachment.*—On the 8th October 1888, the decree-holder applied for execution of his decree by attachment and sale of the whole of the judgment-debtor's immovable property, and the report of the attaching officer was that attachment had been effected on the 22nd October 1888 by beat of drum on the spot and by affixing a notice, under Section 274 of the Civil Procedure Code, on the house of the judgment-debtor, situate on the spot. It did not, however, appear from the report that a copy of the notice was affixed in the Court-house or in the office of the Collector of the District, and no evidence was adduced on this point. The plaintiff purchased the land in dispute from the said judgment-debtor on the 18th March 1891, and it was contended on his behalf that, in order to render the sale to him invalid, the decree-holder was bound to prove that all the conditions of Section 274 had been duly complied with. It was proved that there had been litigation about the attachment before plaintiff's purchase, and that the latter's sale-deed was executed at Lahore, and not at Amritsar, where it would ordinarily have been executed.

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Held, having regard to the circumstances of the case, that plaintiff had notice *alimunde* of the attachment, and that there was no reason to hold that the condition of Section 274 had not been complied with, or, in any case, that the attachment was not valid against plaintiff.

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" Section 336.—*Civil Procedure Code, 1882, Sections 336, 387* "A—*Arrest and imprisonment in execution of decree—Subsequent application stating judgment-debtor's intention to apply to be declared an insolvent—Rejection of application—Illegal confinement—Duress.*—Where a debtor, on being arrested and brought before a Court in execution of a decree, expresses his intention to apply to be declared an insolvent, under Section 336 of the Civil Procedure Code, the Court must release him on his furnishing security to appear when called upon, and to apply within one month under Section 344 of the Code.

Held, that, without holding that an application under Section 336 cannot under any circumstances be made after proceedings under Section 337. A, the Court in the present case was not bound to release the petitioner, and that his confinement in jail was not illegal by reason of such application.

5

Section 365.—Death of sole plaintiff after conclusion of case, but before delivery of judgment—Decree drawn up in favour of deceased plaintiff—Material irregularity—Civil Procedure Code, 1882, Sections 365, 366.—In a certain case after evidence had been taken and arguments heard on the 28th and 29th September 1897, the District Judge on the 2nd November 1897 gave the (sole) plaintiff a decree for the property claimed, and at the foot of his judgment recorded the following note:—

Held, that under the circumstances of the present case, there had been a disregard of the provisions of the Civil Procedure which had materially prejudiced the defendant, inasmuch as she could not appeal against a dead person, and had no right of appeal against

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subject to no such qualification, and gave a decree in plaintiff's favour for Rs. 2,500 on "the pleadings as they stand." This decree was at first modified by the Divisional Judge, on appeal, but was subsequently restored by him on review. Defendant appealed to the Chief Court, and it was objected, on plaintiff's behalf, that the decree fell within the purview of Section 375 of the Civil Procedure Code, and was therefore final.

Held, that, whether or not the decree in the present case fell under the said section, the procedure of the District Judge was sufficiently tainted with material irregularities to justify interference under Section 622 of the Code.

Seemle: Under the circumstances of the case an appeal was competent.

Held, that the material irregularities committed by the District Judge were (i) in stating that his decree was based on the pleadings when in fact the said decree was not made with reference to any material allegation of fact or proposition of law relating to the subject-matter of the suit made or affirmed by one side and admitted by the other; (ii) even assuming that the Court had power to pass such a decree, in not enquiring, as it was bound to do, into the objections of defendant, whose pleaders should have been asked whether repudiation meant that the original offer had not been made with authority or merely that it was withdrawn and the acceptance too late; (iii) in not making any inquiry as to whether defendant's pleader had express authority to make the offer of the 15th October; (iv) in assuming that the said offer was still binding on the 24th October, and in proceeding to pass a decree in accordance with its terms without further inquiry.

Held, therefore, that the decrees of the lower Courts must be set aside.

A pleader has not power without express authority from his client to bind him by a compromise 50

Civil Procedure Code, 1882, Sections 520, 521, 522, 523, 525.—Civil Procedure Code, 1882, Sections 520, 521, 522, 523, 525, 622—Power of Court to inquire into objection denying validity of a reference to arbitration—Revision—Practice.

Held, by the Full Bench, that it is not competent to a Court, upon an application, under Section 525 of the Civil Procedure Code, to file an award, to inquire into and decide objections other than those specified in Sections 520 and 521 of the Code.

It is not the invariable, though it is the usual, practice for a High Court to refuse to interfere, under Section 622 of the Code, when the party professing to be injured has another remedy open to him.

No. 134, *Punjab Record*, 1888, and No. 49, *Punjab Record*, 1893, overruled 21

" " " " Section 562.—*Oaths Act, 1873, Section 11—Evidence given by person on oath, effect of, as regards person offering to be bound*

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thereby—Civil Procedure Code, 1882, Section 562.—Under Section 11 of the Oaths Act, 1873, the evidence given by a person on oath is, as regards the party who offered to be bound thereby, conclusive proof merely of the matter stated and of nothing further.

Where, therefore, in a suit by plaintiff for Rs. 550 profits lost by plaintiff through the default of N. C. and another, defendants, to deliver gram during one month at contract rate, and for Rs. 80 earnest-money paid to N. C., it appeared that one D. D., defendant, who made the contract as a broker and was alleged to have been a surety for its due performance, challenged N. C. to the oath, saying that if N. C. would swear that he (N. C.) had not received the earnest-money, he himself would be responsible for the plaintiff's claim, and the said N. C. thereupon swore that he had not received the said earnest-money, *held*, that such statement, on oath, merely concluded the question whether N. C. had or had not received such earnest-money.

Held, therefore, that the first Court had erred in regarding the oath so taken as *per se* sufficient ground for decreeing the suit as against D. D. and dismissing it as against the other defendants.

Held, further, that inasmuch as the first Court had decreed the suit merely on the oath taken, and had not decided any of the five issues which it had framed, the lower Appellate Court had rightly remanded the case under Section 562 of the Civil Procedure Code 45

Civil Procedure Code, 1882, Section 562.—Order of remand under Section 562, Civil Procedure Code, 1882—Erroneous order—Powers and duties of Chief Court when hearing appeal from such order.

Held, that when a certain fact is the basis of a suit and there is no suggestion that the inquiry into that fact by the first Court has been insufficient or imperfect, and the lower Appellate Court, differing from the Court of first instance as to the existence of that fact, has remanded the suit under Section 562 of the Code of Civil Procedure, the Chief Court, when hearing an appeal from the order of remand, is entitled, when it finds that the order of remand should not have been made under that section, to itself consider and decide upon the truth of such fact, and is not bound to return the appeal to the lower Appellate Court for decision thereon 56

" " " " *Section 562.—Appeal and cross-objections—Power of appellant to defeat cross-objections by withdrawing from appeal—Case remanded to lower Appellate Court under Section 562, Civil Procedure Code—Default of appellant—Proper order for lower Appellate Court to pass.*—The first Court having decreed plaintiff's suit for pre-emption at Rs. 492, plaintiff appealed to the Divisional Court as to the price, and defendant cross-objected that plaintiff's suit had not been filed by a duly qualified agent. The Divisional Court dismissed the suit on the latter ground, whereupon plaintiff appealed to the Chief Court, which remanded the case to the lower Appellate Court, under Section 562 of the Civil Procedure Code, for decision as to whether plaintiff's alleged agent had been duly authorised to institute the suit, and for disposal of the appeal if the suit were found to be within limitation. At the date fixed for hearing on the remand, plaintiff failed to appear, whereupon the lower Appellate Court passed an order to the effect that the appeal

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must be dismissed for plaintiffs' default, and that, therefore, defendant's cross-objection failed, and could not be entertained.

Held, that inasmuch as the case had been remanded by the Chief Court merely in order to give plaintiff an opportunity of proving that his alleged agent was duly authorized to institute the suit, the lower Appellate Court should have held, on plaintiff's default, that the previous order of the Divisional Court stood.

Held, further, that when once an appeal has come to a hearing, the Court is seised of the appeal, and an appellant cannot in such a case defeat a cross-objection by withdrawing from the appeal 86

Civil Procedure Code, 1882, Section 582. —See Section 588 (6), infra.

" " " " *Section 588 (6).—Appeal from order of Appellate Court returning plaint for amendment or for presentation to proper Court—Civil Procedure Code, 1882, Section 53, 582, 588 (6).*

Held, following *I. L. R., III All., 456*, that an order of an Appellate Court returning a plaint for amendment or for presentation to the proper Court is not appealable under Section 588 (6) of the Civil Procedure Code, that clause being applicable only to orders passed by Courts of first instance 15

" " " " *Section 591.—Guardian and Wards Act, 1890, Section 12 (3) (b), 47—Preliminary order as to custody of property—Revision—Civil Procedure Code, 1882, Section 591.—At the hearing of an application, under Act VIII of 1890, for the custody of the person and property of a minor at the time living with his step-mother, the Court by an interlocutory order issued a commission to a certain Munsif to make a list of the property of the minor and to lodge it in Court for safe custody, care being taken that the step-mother was given the necessary utensils, clothes, &c., for her support and maintenance. The step-mother applied to the Chief Court on the Revision Side to set aside the order, but it was objected on behalf of the respondent that, inasmuch as an appeal from the final order of the lower Court in this case lay to the Chief Court, the order in question was not open to revision. On behalf of petitioner it was contended that, the property affected being in her possession, no order passed in appeal could remedy the injury caused by the order, which was *ultra vires* with reference to the provisions of Section 12, sub-section (3), clause (b), of Act VIII of 1890, and, further, that the petitioner was not bound to appeal against an order appointing the respondent guardian, while, in the event of his application being dismissed, she could not appeal against the order in question, which in any event did not affect the decision of the case, in the terms of Section 591 of the Civil Procedure Code.*

Held, that the order in question being passed by the Court for the temporary custody and protection of the minor's property, and the custody of the Munsif being in effect the custody, of the Court, did not violate the rule contained in Section 12 (3) (b) of Act VIII of 1890, and that the words "any person" in the said clause could not be interpreted to include the words "the Court."

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The Court being satisfied that this was not a case in which the revisional powers of the Court should be exercised, dismissed the application 10

Civil Procedure Code, 1882, Section 622.—See Civil Procedure Code, 1882, Sections 520 and 623, Revision.

" " " " Section 623.—*Small Cause Court Act, 1887, Section 25*
—*Second application for revision after rejection of first application—*
—*Civil Procedure Code, 1882, Sections 622, 623 (b).*

Held, that there is nothing in the Civil Procedure Code, or in the Small Cause Courts Act, 1887, to prevent the Court entertaining a fresh petition under Section 25 of the latter Act after dismissal of a previous petition under the same section.

Held, further, that even if the former order on the previous petition could be held to be a bar to the Court entertaining the subsequent petition, the latter could, and ought to be treated as one for review of judgment, falling under clause (b) of Section 623 of the Civil Procedure Code, which is wide enough to include unappealable orders of the Court hearing the application, whatever may be the status of the Court.

The Court has inherent power to remedy injustice by a re-consideration of an order passed by it, unless precluded by a rule of procedure or practice 23

Compensation for improvements by mortgages.—See Mortgage, No. 6.

Compromise.—Appeal—Civil Procedure Code, 1882, Sections 375, 622—Offer made by defendant pendente lite to settle case—"Compromise"—Decree based on plaintiff's acceptance of offer—Offer repudiated by defendant—Power of pleader to compromise suit.—See Civil Procedure Code, 1882, Section 375.

Concealment—Fraudulent, of sale.—See Limitation Act, 1877, Section 18.

Confinement—Illegal.—See Civil Procedure Code, 1882, Section 336.

Consideration.—Contract Act, 1872, Section 52—Reciprocal promises—Written Contract—Consideration extraneous to terms of contract.—See Contract Act, 1872, Section 52.

" *Promissory Note—Consideration—Inequitable bargain—Burden of proof.—See Promissory Note, No. 1.*

" *Document, construction of—Promissory Note or acknowledgment of liability—Suit based on document stamped with anna stamp—Admissibility of document in evidence—Right of plaintiff to fall back on original consideration—Evidence Act, 1872, Section 91—Stamp Act, 1879, Section 34.—See Promissory Note, No. 2.*

Construction of Document.—Punjab Courts Act, 1884, Section 40—"Questions of law involved"—Burden of proof—Construction of deed.—See Burden of proof, No. 6.

" " " *Construction of document—Provision in mortgage-deed regarding interest.—See Interest.*

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Construction of Document.—Suit for pre-emption—Sale or contract to sell—Construction of deed.—See Pre-emption, No. 6.

" " " *Construction of document—Promissory note or acknowledgment of liability—Suit based on document stamped with anna stamp—Admissibility of document in evidence—Right of plaintiff to fall back upon original consideration. See Promissory Note, No. 2.*

" " " *Construction of document—Registration Act, 1877, Sections 17, 49—Partnership or co-ownership.—See Registration Act, 1877, Section 17.*

" " " *Construction of will—Bequest to Hindu widow as malik—Presumption as to nature of bequest.—See Will, No. 3.*

Contract Act, 1872.—Section 23—Contract Act 1872, Section 23—Immoral contract—Suit for rent for house let to prostitute.—Plaintiff, who was the owner of a house which he had let to defendant, a prostitute, in the ordinary way of business, sued for recovery of the rent. It appeared that plaintiff probably knew that defendant was a prostitute, but it was not shown that the house was let for the express purpose of being used as a brothel, or that plaintiff was to have any share in, or receive rent out of, defendant's earnings as a prostitute.

Held, that the agreement was not immoral, and that plaintiff was entitled to recover the rent due thereunder

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" " *Section 23.—Suit for recovery of money paid to agent for unlawful purpose—Suit instituted before execution of unlawful object—Principal and agent—Contract Act, 1872, Section 23—Locus penitentiae. Plaintiff sued on the allegations that he paid a sum of Rs. 300 to the defendant, a friend of his, to procure him a bride; that defendant had represented that this sum was to be paid to the bride's father in advance, and the betrothal performed on the 9th Navratri; that no betrothal had taken place, and that defendant on being asked to refund had denied the receipt of the money. Defendant denied the transaction altogether. The first Court found that plaintiff's allegations were proved, and that he was entitled to recover, but the Divisional Judge, on appeal, held that the defendant had undertaken to act as a mere procurer, that the contract was opposed to morality and public policy and, following No. 116, Punjab Record, 1880, dismissed the suit without going into the facts. Plaintiff appealed to the Chief Court.*

Held, that inasmuch as, upon the true construction of the transaction, defendant was merely a go-between or agent of the plaintiff for paying the money to the bride's father, the property in the money did not pass to the defendant, but remained with the plaintiff so long as it continued in defendant's hands, or until it was paid over to the father of the intended bride.

Held, therefore, that the suit was maintainable.

A person who pays money to his agent, whether on the agent's representation or of his own motion, for an unlawful purpose is entitled to a locus penitentiae, and can call back his money at any time

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before the purpose is executed, nor in such a case can the agent, merely because he was entrusted with an unlawful commission, repudiate his liability to refund and appropriate the money to his own use.

I. L. R., XXIII *Calc.*, 962; *I. L. R.*, XVIII, *Mad.*, 388; No. 106, *Punjab Record*, 1879; No. 50, *Punjab Record*, 1880; No. 116, *Punjab Record*, 1880; No. 128, *Punjab Record*, 1889; *Taylor v. Bowers* (*L. R.*, Q. B. D., 291) and *Kearley v. Thomson* (*L. R.*, XXIV, Q. B. D., 747), referred to " " " " " " " "

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Contract Act, 1872. Section 30.—*Provincial Small Cause Court Act*, 1887, Section 25—*Revision*—*Wagering transaction*—*Written contract*—*Admissibility of evidence to prove that contract was void under Section 30 of the Contract Act*—*Evidence Act*, 1872, Section 92.—See *Revision*, No. 6.

" " " Section 52.—*Contract Act*, 1872, Section 52—*Reciprocal promises*—*Written contract*—*Extraneous consideration*. Plaintiff had a money decree against one L. S., *jagirdar* of Majra, and had possession of the village, the revenue being then payable in kind, by virtue of a *patta* from the said L. S. On the 30th May 1891, the latter granted a lease of his *jagir* rights for twenty years to his son, R. D., and the defendant, T. S., in equal shares, stipulating to receive Rs. 500 a year from them, and they, in their turn, undertaking to pay Rs. 225 annually on account of cesses and the *natrana* due to Government from the *jagirdar* into the *taksil*. Of the balance Rs. 275, one-half was to be paid by the lessor to R. D., and out of the other half the defendant, T. S., was to pay Rs. 100 annually to the plaintiff in liquidation of his decree against the lessor, and Rs. 37-8-0 to the lessor himself. On the 31st May 1891, T. S. executed the bond, now sued upon, in favour of plaintiff, whereby he agreed to pay the amount of the plaintiff's decree, which was fixed at Rs. 1,400 in yearly instalments of Rs. 100 each, payable before *Jeth* each *Sambat* year from 1948. In case of default, the whole amount due at the time was to be realizable at once. On the said date plaintiff wrote a document (called a receipt) in favour of T. S. and R. D., by which he declared that he had given up possession of the village which he had been holding under the *jagirdar's patta*, and stipulated that he would pay the revenue due on account of the lands held by him, as owner or mortgagee, to them. Plaintiff having sued to recover Rs. 1,250 on the bond upon the allegation that T. S. had paid him Rs. 150 only of the stipulated instalments, and had failed to pay the rest, T. S. pleaded that the consideration for the bond, *viz.*, the lease of his *jagir* by L. S., had failed as it was incapable of enforcement, and that plaintiff by his own conduct, in paying the *jagir* dues to L. S. contrary to his agreement, was precluded from suing on the bond. It was proved that plaintiff had paid the revenue of his lands direct to L. S. since *Rabi* 1892, and not to the lessees as agreed upon, and that T. S. had realized *batai* for *Kharij* 1891. The first Court accepted T. S.'s plea and dismissed the claim so far as it was based on the bond, but the Divisional Judge, on appeal, decreed plaintiff's suit in full on the ground that the bond was an independent contract, the consideration being the release of L. S. from his liability under the decree. T. S. appealed to the Chief Court.

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Held, upon the facts as above stated, that the contract between plaintiff and T. S. was contained in the bond and the so-called receipt read together, and not in the bond alone, and that plaintiff's failure to pay the *jagir* dues to T. S. and R. D., as he had agreed to do, was a sufficient ground for T. S. avoiding his contract as contained in the bond.

The consideration for a contract is extraneous to its terms, and there is no legal objection to proof being given that the recital of the consideration in a written contract is incomplete or is in reality something different 17

Contract Act, 1872.—Sections 60, 61.—See Partnership, No. 2.

" " " *Section 217.—See Partnership, No. 2.*

" " " *Section 262.—See Partnership, No. 2.*

Contradictory Findings—Material irregularity.—See Burden of proof, No. 6.

Co-ownership or Partnership.—See Partnership, No. 1.

Co-sharers—Sale of share in residential house by one of several.—See Civil Procedure Code, 1882, Section 263.

Cross Objections.—See Appeal in Civil Cases, No. 9.

Custody of minor's person or property.—See Guardian and Wards Act, 1890, Section Minor, No.

Custody of Wife.—See Husband and Wife, No. 2.

Custom—I. Adoption.—See Hindu Law—Adoption, Nos. 1, 2.

" " " *Custom—Adoption of sister's son—Muhammadan Jats of Zira tahsil, Ferozepore District.*

Found, that defendants, upon whom the *onus* rested, had failed to prove that by custom among Muhammadan Jats of the Zira tahsil, Ferozepore District, the adoption of a sister's son is valid in the presence, and without the consent, of the adoptive father's agnates ... 1

" " " *Custom—Adoption of daughter's son—Ghumman Jats of Sialkot District—Perversion of next collaterals to Muhammadanism.—According to the Riwaj-i-am of the Sialkot District, it is competent to a Ghumman Jat to adopt his daughter's son, but a nephew has a prior right to be adopted. Where, however, the nephews had perverted to Muhammadanism, held, that it lay upon them to prove that they were entitled to be adopted in preference to a daughter's son, and that their existence rendered the adoption of such daughter's son invalid, and that they had failed to prove this.*

Found, under the circumstances of the case, that the *factum* of adoption had been sufficiently proved 25

Custom—II. Alienation.—See Occupancy Rights, Nos. 2, 3

" " " *Custom—Alienation—Distinction between gifts inter vivos and wills—Onus probandi—Pathans of Peshawar District.—Although*

The references are to the Nos. given to the cases in the "Record."

- a proprietor has, by custom, a plenary power of alienation *inter vivos*, it does not follow that he has, by custom, a power of alienation by will, and the *onus* of proving that he has the latter power rests upon the party taking his stand on the will, especially when an alienation by will is void under the personal law of the proprietor.
- The distinction between gifts *inter vivos* and wills discussed by Chatterji, J. 24
- Custom—II. Alienation.—Custom—Alienation—Gift by sonless proprietor to first cousin who was also his uterine brother—Awans of tahsil Khushab, Shahpur District.—One M., a full proprietor, before his death executed a deed of gift of his land in favour of his first cousin, who was also his uterine brother, and put him in possession. The parties were Awans of mauza Mardwal, Khushab tahsil, Shahpur District.*
- Found*, that the said gift was valid by custom 49
- " " " *Custom—Alienation—Suit by remote reversioner in presence of nearer reversioner—Speculative suit.—The rule that where a nearer reversioner is precluded from suing to contest an alienation, or colludes with the alienor, a more remote reversioner can sue, has no application to a purely speculative claim with only the remotest chance of ever having any practical effect.*
- In the present case the plaintiffs, according to the genealogical table, had only a very remote chance of succeeding to a small portion of the estate in dispute.
- Held*, that plaintiffs were not entitled to sue for a declaration that an alienation should not affect their reversionary rights.
- No. 7, *Punjab Record*, 1893, and No. 81, *Punjab Record*, 1896, followed 57
- " " " *Custom—Alienation—Escheat—Right of proprietary body to contest alienation by widow of childless proprietor—Kangra District—Right to sue.*
- Found*, that there is no custom by which in the Kangra District, the estate of a childless proprietor escheats (after the death of the widow of such proprietor) to the village community or the owners of the subdivision in which the land is situate.
- Although under the existing revenue system two ingredients of jointness have been introduced among artificially created village communities, *vis.*, (i) joint right in the waste attached to each village, and (ii) joint liability for the revenue assessed on the village, the right of escheat is not a necessary consequence of such jointness, nor has it been declared to be so by any statutory provision.
- Held*, further, that even if by custom the widow of a childless proprietor was incompetent to alienate, or to give a valid title, except for necessity, it was not open to one who was not a reversioner to sue to set aside her act, and that in such a case the plaintiff must succeed on the strength of his own title and cannot derive help from the widow's incapacity to alienate.

The references are to the Nos. given to the cases in the "Record."

	No.
The question as to the reversionary rights of the proprietary body in such cases discussed historically by <i>Chatterji, J.</i> ...	61
<i>Custom—II. Alienation.—Custom—Alienation—Gift by widow in favour of daughter married after death of widow's husband—Khanadamadi—Gujars of Gujrat—Riwaj-i-am.</i> —In a case in which the parties were Gujars of Gujrat District, found, that, the right which a landowner has to make his daughter and her issue heirs in <i>Khanadamadi</i> cases cannot be extended in favour of such landowner's widow, and that the widow is not entitled by custom to gift her late husband's land to her daughter ...	67
" " " <i>Custom—Alienation by sonless proprietor—Locus standi of remote collaterals to object to alienation—Dhillon Jats, Lahore District.</i> —The right of male agnates to contest alienations by sonless proprietors is founded on the fundamental principles on which land is held among agricultural tribes in the Punjab, and so far from there being any <i>a priori</i> presumption against the <i>locus standi</i> of male agnates beyond a certain degree of relationship to object to such alienations, the presumption is exactly the reverse.	
<i>Held</i> , therefore, in a case in which the parties were Dhillon Jats of the Lahore District, that plaintiffs who were related to the alienor in the ninth degree were competent to object to the alienation in question.	
The mere facts that the property in dispute was situate in a large place (<i>mauza</i> Basin), which was almost a town, that land was held there by various tribes, and that numerous alienations had taken place therein (but almost all subsequently to 1893) without objection by male agnates, <i>held</i> not to be <i>per se</i> sufficient to establish the right of a sonless proprietor to alienate without necessity ...	75
" " " <i>Custom—Alienation—Gift to sister's son followed by possession and mutation of names—"Ancestral property."</i> —In a case in which the property in dispute had been acquired by one K. jointly with his brothers, but had never been held by their father, <i>held</i> , that the said property was not ancestral property <i>qua</i> K.'s collaterals.	
<i>Held</i> , therefore, that a gift of such property, followed by possession and mutation of names, by K. in his lifetime to his sister's son was not invalid by custom.	
Mutation of names by itself does not in every case constitute a valid transfer, but it is good evidence of such transfer ...	76
" " " <i>Custom—Alienation—Suit by son in presence of his father to contest an alienation by an agnate—Locus standi of plaintiff—Sodhi Khatri of tahsil Ziru, Ferozepore District.</i> —In a suit by plaintiff to contest an alienation by his father's uncle, it appeared that plaintiff's father was alive, but refused to join in the suit. The question referred to the Full Bench was whether, under such circumstances, plaintiff had any <i>locus standi</i> to sue.	
<i>Held</i> , that under Customary law by which the parties were governed, plaintiff was entitled to sue to set aside the alienation in question, and that the District Judge had erred in dismissing his suit on the ground that he had no <i>locus standi</i> ...	84

The references are to the Nos. given to the cases in the "Record."

No.

Custom—III. Inheritance.—See Abandonment of Worldly Affairs.

" " " *Custom—Succession—Right of daughter to succeed to her father's first cousin—Kanets of Kangra District.*

Found, that plaintiff had failed to prove that, by custom among Kanets of Kangra District, a woman is entitled to succeed to the estate of her father's first cousin after the succession and subsequent death of the latter's widow, to the exclusion of the agnatic heirs.

Semble: Among Kanets of the Kangra District, a daughter is entitled to succeed to her father's estate to the exclusion of remote collaterals 3

" " " *Limitation Act, 1877, 2nd Schedule, Article 93—Suit for declaration that an alleged will was a forgery, and that testator had no power to make such will—Custom—Succession of daughter.—On the death in 1866 of one M. M., who left a widow and three daughters, mutation of names in respect of his property was effected in favour of the widow, who applied in 1877 to have mutation in respect of three-fourths of the said property effected in favour of the daughters, in virtue of a will purporting to have been executed in their favour by M. M. shortly before his death. This application was resisted by the present plaintiffs, collaterals of M. M., and rejected on the ground that the will was probably a forgery. In 1872 and 1887 the widow dealt with the property in suit as her own, and on the second occasion plaintiffs obtained a decree declaring that her dealings with the property did not affect their reversionary rights. In 1894 the daughters sued the widow for possession of three-fourths of the said estate and obtained a decree on a confession of judgment. Plaintiffs, who were no parties to the said suit, in November 1894, instituted the present suit for a declaration that (i) the said will was a forgery; (ii) M. M. had no power to make such a will, and that if genuine, it was never acted on and was inoperative; and (iii) that the decree in favour of the daughters was collusive and inoperative against their rights as reversioners. Defendants pleaded that plaintiffs' suit was barred by limitation; that the will was genuine; and that, in any event, the daughters were entitled to succeed in preference to male collaterals such as the plaintiffs.*

Held, (i) that the proceedings in 1894 gave rise to a fresh cause of action, and that the suit was within limitation; (ii) that the alleged will had not been proved to be genuine; and (iii) that no special custom had been proved to exist among the parties whereby daughters were entitled to succeed in the presence of male collaterals 5

" " " *Custom—Succession—Ala and adna maliks—Mauza Manabad, tahsil Moga, Ferozepore District.*

Held, that in mauza Manabad, tahsil Moga, Ferozepore District, an ala malik is merely entitled, as a taluqdar, to 5 per cent. on the revenue, and, further, that on the death of an adna malik without issue, the latter's estate does not revert to the ala maliks, but to the collaterals of the deceased.

Semble: In the said village, which is divided into patti, on the death of an adna malik his land would, for default of nearer heirs, become shumilat of the patti, and be divided among the pattidars ...

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The references are to the Nos. given to the cases in the "Record."

No.

Custom—III. Inheritance—Custom.—Succession—Legitimacy—Chaddar-andazi marriage, proof of.—Plaintiff claimed to succeed to part of the estate of one K., on the ground that he was the legitimate son of K. by one Mussammat R. D., who, he alleged, had been married by *chaddar-andazi* to K. after the death of her former husband, one M. Defendants denied that Mussammat R. D. had ever been married to K., and that plaintiff was K.'s son. It appeared that after the death of M., K. and Mussammat R. D. lived together, and were regarded by the *baradari* as man and wife, and that plaintiff after K.'s death was entered in the revenue records as K.'s son. The parties were residents of the Garshankar *tahsil*, Hoshiarpur District.

Held, that under the circumstances abovementioned it had been sufficiently proved that the ceremony of *chaddar-andazi* had actually been performed, and that, therefore, plaintiff was entitled to succeed as prayed.

Quære: Whether in the said district the ceremony of *chaddar-andazi* is necessary to validate marriage 13

" " **Custom—Succession—Respective rights of daughters and collaterals—Sabzani Lund Biluchis, Dera Ghazi Khan District—Riwaj-i-am.**

Found, that defendants had failed to prove that, by custom among Sabzani Lund Biluchis of Dera Ghazi Khan District, daughters are entitled to succeed in preference to collaterals.

In such cases the mere fact that the daughter has married in the tribe and is in actual possession of the land gives her no right of succession superior to that of the collaterals 37

" " **Custom—Succession to childless proprietor—Exclusion of near collaterals by proprietors of village—Village founded within boundaries of old village—Right of collaterals residing in latter to succeed to land in former—Succession of adopted son in his natural family—Riwaj-i-am.**—In the present case it appeared that *mauza Ferozabad* had been founded by the grandfather of the two deceased proprietors, the succession to whose lands was in dispute, within the boundaries of *mauza Rania*. The two proprietors having died childless, the proprietors of *mauza Ferozabad* claimed to exclude the near collaterals who lived in *mauza Rania*, and based their claim on an entry in the *Wajib-ul-arz* to the effect that on the death of a landowner without issues his near collateral should succeed provided he lived in the same *patti*; otherwise the landowners of that *patti* should succeed. There was no such entry in the *Wajib-ul-arz* of *mauza Ferozabad*, but it was contended that the entry in question applied equally to that village inasmuch as it had been founded from the other.

Held, that the said entry was very unusual and not very reasonable, and should not, therefore, be extended to *mauza Ferozabad* so as to give the proprietors of that village a preferential right over the near collaterals.

Held, further, that the decision of the Court in No. 64, *Punjab Record*, 1893, did not apply to the present case, inasmuch as the

The references are to the Nos. given to the cases in the "Record."

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founder of *mauza* Ferozabad did not go and acquire land in a remote village, but merely assisted in founding a new village within the boundaries of his old village, and also because the collaterals, as descendants of the founder, were claiming property which, so far as they were concerned, was ancestral property.

Held, also, as regards the conflicting claims of the collaterals *inter se*, that an adopted son and his descendants are entitled to succeed in the natural family of such adopted son 68

Custom—III. Inheritance.—Custom—Succession—Chundawand or Pagwand rule—Sindhu Jats of Bagiana Kalan, Chunian tahsil, Lahore District—Burden of proof.—In a case in which the parties were Sindhu Jats of Bagiana Kalan, Chunian *tahsil*, Lahore District, *found*, that plaintiffs, upon whom the *onus* rested, had failed to prove that in questions of succession the parties were governed by the *Chundawand* and not by the *Pagwand* rule 74

" " *Custom—Succession—Suit between co-proprietors of village in which the land was situate and deceased's near agnates residing in another village—Finding in a previous suit that one of the co-proprietors was deceased's collateral, effect of—Res judicata—Dhillon Jats of Naraingarh, Amritsar District.*—Plaintiffs, who were residents of Bhutiwala in the Ferozepore District, claimed certain land left in Naraingarh, Amritsar District, by one Mussammat Premi, widow of Attar Singh, a Dhillon Jat, on the ground that they were descendants of Budh Singh, grandfather of Attar Singh, one plaintiff being his son and the others grandsons and great-grandsons. The defendants were Dillon Jats of Naraingarh, but claimed no relationship with the deceased and belonged to a different *taraf* to that of Attar Singh. On the death of Mussammat Premi, defendants obtained mutation of names in their favour despite the objections of plaintiffs, who therefore instituted the present suit. In the first Court defendants pleaded, *inter alia*, that plaintiffs were not the agnates of the deceased's husband, and that being residents of another village and district, and having had no connection with Naraingarh or the family of the deceased, they were excluded by law and custom. The first Court drew issues, in accordance with the pleadings, and decided them all in favour of plaintiffs. Defendants appealed to the Chief Court on the same grounds as were urged in the lower Court, and at the hearing it was also contended on their behalf that plaintiffs' claim was barred by a judicial decision of the then Assistant Commissioner of Amritsar, dated 25th August 1871, by which defendants were declared reversioners of the deceased widow, and obtained a decree setting aside, as far as their interests were concerned, a certain mortgage effected by her of part of the land left by her husband. The ground upon which the defendants' contention was based was that in the former suit the widow represented the interests of the reversioners, and that the decision that one of the defendants was her reversioner bound the present plaintiffs if they were the persons by agnatic descent entitled to succeed to the estate left by her.

Held, overruling the said contention, that the finding in the former case was merely to the effect that the defendant in question was a collateral of the widow, and as such was competent to contest the

The references are to the Nos. given to the cases in the "Record."

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widow's mortgage, and that the said finding in no way precluded plaintiff from proving that they were nearer collaterals and had a preferential claim to succeed to the property.

Found, upon the evidence that plaintiffs were nearer collaterals than the defendants.

Held, therefore, that the plaintiffs' relationships being established, they were the *warisan ek jaddi* of the deceased widow's husband, and their common ancestor had been in possession of the land in suit, and that in such a case there was no authority for holding that the collaterals, because residents in another village, were excluded by the other proprietors, in the deceased's village, though not related to him

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Custom—III. Inheritance.—Custom—Succession—Issue of woman whom a man could not legally marry, but treated by him as his wife—Varaich Hindu Jats of tahsil Gujranwala—Riwaj-i-am.

Found, that no custom had been proved amongst Varaich Hindu Jats of Gujranwala tahsil whereby, when a proprietor has throughout his life lived with a woman whom he could not legally marry and has treated her as his wife and his sons by her as ordinary sons, such sons succeed to his estate on his death

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Custom—IV. Marriage.—See Custom—III. Inheritance, No. 4.

Custom—V. Pre-emption.—See Pre-emption.

D.

"Dakhil Kharij."—See Custom—II. Alienation, No. 7.

Damages.—Monthly tenant wrongfully holding over—Damages.—See Landlord and Tenant, No. 2.

Death of Plaintiffs—Pendente lite.—See Civil Procedure Code, 1882, Section 365, and Pre-emption, No. 12.

Declaratory Decree—Speculative suit.—See Specific Relief Act, 1877, Section 42.

Decree.—Civil Procedure Code, 1882, Section 108—Money paid into Court—Ex-parte decree upheld—Application by decree-holder for payment of deposit—Limitation Act, 1877, Act, 179—Execution of decree.—See Civil Procedure Code, 1882, Section 108.

„ *Civil Procedure Code, 1882, Section 136—"Decree"—Appeal.—See Civil Procedure Code, 1882, Section 136.*

„ *Civil Procedure Code, 1882, Section 230—Execution of decree—Limitation Act, 1877, Article 179 (iv).—See Civil Procedure Code, 1882, Section 230.*

„ *Application for execution of whole decree by one of several joint decree-holders—Dismissal of application—Appeal.—See Civil Procedure Code, 1882, Section 231.*

„ *Decree for pre-emption—Civil Procedure Code, 1882, Section 244—Question whether decree-holder has paid money into Court within time.—See Civil Procedure Code, 1882, Section 244.*

The references are to the Nos. given to the cases in the "Record."

No.

Decree.—*Validity of attachment in execution of decree.*—*Civil Procedure Code, 1882, Sections 274, 276.*—See *Civil Procedure Code, 1882, Section 274.*

„ *Arrest and imprisonment in execution of decree—Subsequent application stating judgment-debtor's intention to apply to be declared insolvent—Rejection of application—Illegal confinement—Duress.*—See *Civil Procedure Code, 1882, Section 336.*

„ *Decree in favour of a plaintiff who was dead at the time.*—See *Civil Procedure Code, 1882, Section 365.*

„ *Pre-emption—Decree directing money to be paid into Court by certain date, but not stating consequences of non-compliance—Execution of decree—Limitation Act, 1877, Article 179.*—See *Limitation Act, 1877, 2nd Schedule, Article 179, No. 3.*

„ *Declaratory decree—Speculative suit.*—See *Specific Relief Act, 1877, Section 42.*

Dedication of road to Public.—*Easement—Right of way—Public or private road—"Question of law"*—*Limitation Act, 1877, Section 26—User of road by public for less than 20 years—Presumption as to dedication—English law*—See *Easement.*

Diluvion and Alluvion.—See *Alluvion.*

District Judge.—*Punjab Courts Act, 1884, Sections 26, 75—"Business" and "functions" of District Court—Power of District Judge to assign function of trying a case to Additional District Court—Case in excess of pecuniary limits of latter Court's jurisdiction.*—Section 75 of the Punjab Courts Act must be construed in consonance with Section 26 of the Act, and it is therefore not competent to a District Judge by any act of his under sub-section (2) of Section 75 to extend the powers conferred on Judicial Officers by the Local Government under Section 26.

The "business in the Court of the District Judge" spoken of in Section 75 (1) of the Act means business it has to dispose of as the District Court, and the "function" mentioned in sub-section (2) of the said section are functions proper to such Court, and must be such as a Sub-Judge of the highest class is unable to discharge, and do not mean the mere trial of civil suits of the value of over Rs. 5,000

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Districts.—*Immovable Property situate in different, suit for.*—See *Cause of Action.*

Document, construction of.—See *References under Construction of Documents.*

Documents, order to produce.—See *Civil Procedure Code, 1882, Section 130.*

Duress.—*Civil Procedure Code, 1882, Sections 336, 337 A—Arrest and imprisonment in execution of decree—Subsequent application stating judgment-debtor's intention to apply to be declared on insolvent—Rejection of application—Illegal confinement—Duress.*—See *Civil Procedure Code, 1882, Section 336.*

E.

Easement.—*Easement—Right of way—Public or private road—"Question of law"*—*Limitation Act, 1877, Section 26—User of road by public for less*

The references are to the Nos. given to the cases in the "Record."

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than 20 years—Presumption as to dedication—English law.—The principles of the English law regarding the presumed dedication of a road to the public arising from user of such road by the public, being founded on reason and common sense and conducive to public convenience, are applicable to India.

Held, therefore, that the user of a road by the public, openly and as of right, is sufficient, apart from the law laid down in the Limitation Act, 1877, Section 26, to raise a presumption of its dedication to their use, though such presumption might be rebutted by evidence of the owner's intention that the public should only have a permissive user.

In the present case the evidence clearly showed that the road in dispute had been used as a public road for at least 10 years prior to suit, but the Divisional Judge, treating the case as one of prescription, found in favour of defendants, because 20 years had not elapsed since the road was opened (Section 26 of the Limitation Act, 1877).

Held, under the circumstances as above set forth, that there was a presumption that the road had been dedicated to the use of the public, and *found*, upon the evidence and facts of the case, that defendants had failed to rebut such presumption.

The right of the public to pass over a public road is not in the nature of an easement properly so called, nor is it acquired by prescription under Section 26 of the Limitation Act, 1877.

A preliminary objection on behalf of the defendants that there was no ground for admitting a further appeal in the case as there was no "question of law" involved, overruled on the grounds that the questions (a) whether plaintiff had not acquired a right of way over the road in dispute either by long user or grant; (b) whether the road came under the category of a public or a private road, involved consideration of points of law, and were not simple questions of fact.

Held, further, that the Divisional Judge's error in law in deciding the point under Section 26 of the Limitation Act was of itself a sufficient ground for admitting a further appeal, though it was not the ground on which the appeal was admitted by the Judge in Chambers 62

Ejectment.—*Landlord and tenant.—Suit for possession by tenant who had been ejected—Suit instituted more than one year after ejectment—Jurisdiction of Civil Court—Punjab Tenancy Act, 1887, Sections 50, 77 (3) (9).—See Landlord and Tenant, No. 3.*

Escheat.—*Custom—Alienation—Escheat—Right of proprietary body to contest alienation by widow of childless proprietor—Right to sue—Kangra District.—See Custom—II. Alienation, No. 6.*

Estoppel.—*Suit for possession on ground that a certain sale was invalid as against plaintiff—Plea by defendant that plaintiffs acquiesced in sale—Acquiescence—Estoppel.—See Acquiescence.*

The references are to the Nos. given to the cases in the "Record."

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Estoppel.—*Mortgage by widow—Decree of foreclosure against widow—Regulation XVII of 1806—Regularity of proceedings, presumption as to—Suit by reversioners for recovery of land after death of widow—Limitation Act, 1877, 2nd Schedule, Article 141—Res judicata—Estoppel.—See Limitation Act, 1877, 2nd Schedule, Article 141.*

” *Document, construction of—Registration Act, 1877, Sections 17, 49—Partnership or co-ownership—Abandonment—Estoppel—Limitation Act, 1877, Articles 142, 144.—See Registration Act, 1877, Section 17.*

Evidence.—*Mortgage-deed relating to immovable property compulsorily registrable, but registered in wrong Registry Office—Admissibility of deed in evidence—Fraud.—See Registration Act, 1877, Section 49.*

Evidence Act, 1872.—*Section 91.—Document, construction of—Promissory note or acknowledgment of liability—Suit based on document stamped with anna stamp—Admissibility of document in evidence—Right of plaintiff to fall back on original consideration Evidence Act, 1872, Section 91—Stamp Act, 1879, Section 34.—Plaintiff in this plaint alleged that “on the 17th June 1897 defendant raised Rs. 500, cash, at Lahore, “and wrote the promissory note. He agreed to repay the money by “monthly instalments of Rs. 100, and further agreed to pay Re. 1 “per cent. per mensem as interest,” that demand for payment had been made, and that the cause of action arose on the expiry of the period for the payment of each instalment, the suit being filed on the 14th October 1897 for three instalments and interest as above stated. The document referred to had affixed to it an anna stamp, and was in the following terms:—“Received from Mr. E. G., Superintendent, Punjab Dairy, the sum of Rs. 500 only, as advance, repayable by instalments of one hundred per month, and to bear interest at Rs. 12 per cent.—17th June 1897.” It was signed by the defendant.*

The first Court dismissed the suit on the ground that the document upon which it was based was a promissory note, payable otherwise than on demand, and, being insufficiently stamped as such, could not, under Section 34 of the Stamp Act, 1879, be admitted in evidence for any purpose, even on payment of a penalty, in a civil suit. Plaintiff applied for revision of this order, and it was contended on his behalf that the document bore a dual character, as a promissory note and as an admission of liability, and was admissible in evidence as an acknowledgment. It was further contended that the Rs. 500 were made up of advances for milk made at various times, and that plaintiff was in any event entitled to fall back upon the original consideration of the contract.

Held, that the document upon which plaintiff based his suit was a promissory note, payable otherwise than on demand, and, being insufficiently stamped as such, could not, under Section 34 of the Stamp Act, be received in evidence or acted upon in a civil suit.

Held, further, that plaintiff was not entitled to aver against his plaint, or to amend his plaint in such a manner as to sue on the original consideration.

Held, also, that from the frame of the suit it was clear that the document sued on embodied the contract between plaintiff and defend-

The references are to the Nos. given to the cases in the "Record."

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ant, and was the contract out of which defendant's liability arose, and that under Section 91 of the Evidence Act the document was the best evidence of the contract, and no other evidence of the terms thereof could be given	92
Evidence Act, 1872.—Section 92.—Provincial Small Cause Court Act, 1887, Section 25—Revision—Wagering transaction—Written contract—Admissibility of evidence to prove that contract was void under Section 30 of the Contract Act—Evidence Act, 1872, Section 92.— The Judge of the Small Cause Court dismissed plaintiffs' suit on the ground that the evidence proved that the written agreement sued upon, which purported to be one for sale of silver, was not a <i>bond fide</i> transaction, no actual interchange of silver being contemplated, but merely an adjustment of profit and loss with reference to a difference in the market rates. Plaintiffs applied to the Chief Court for revision of the order of dismissal on the ground, (1) that there was no evidence to show that delivery of silver was not intended, and (2) that oral evidence was inadmissible to contradict the terms of the written agreement according to which silver was to be delivered.	
Held, that as there was evidence on which the Judge of the Small Cause Court might base his finding that the transaction was a wager, that finding should not be disturbed on revision.	
Held, further, that the oral evidence was admissible, under the first proviso to Section 92 of the Evidence Act, for the purpose of invalidating the written agreement.	
<i>I. L. R., XVII Mad., 480, and I. L. R., XII Bom., 585, followed ; I. L. R., IX., Calc., 791, not followed</i>	85
Execution of Decree.—See References under Decree.	
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Faqir.—See Abandonment of Wordly Affairs.	
Ferry.—Suit by Lessees of Government Ferry for recovery of tolls.—See Small Cause Court, 1887, 2nd Schedule, Article 13.	
Foreign Court—Suit based on void judgment of.—See Limitation Act, 1877, Section 14.	
Fraud.—Mortgage-deed relating to immovable property compulsorily registrable, but registered in wrong Registry Office—Admissibility of deed in evidence—Fraud.—See Registration Act, 1877, Section 49.	
„ Pre-emption—Fraudulent concealment of sale—Limitation Act, 1877, Section 18, knowledge of facts, presumption as to.— In a suit for pre-emption it appeared that the deed of sale, which was described in two places in itself as a mortgage-deed, was dated 12th December 1876, and was registered on the same date at the <i>tahsil</i> , three or four miles from the village in which the land in suit was situate; that the marginal witnesses were residents of villages other than that in which the vendor and vendee resided and where the land was situate; that from 1876 till 1895 the vendee continued to be recorded, as before, as tenant of the said land; that on the 19th September 1894, a measurement clerk reported that a sale had taken place, and that the vendee was in	

The references are to the Nos. given to the cases in the "Record."

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possession; that on the 1st October 1895 mutation of names was effected in the vendee's favour by order of the Tahsildar, and that the residents of the village in which the land was situate, as a body, were not aware of the sale. The plaint was filed in February 1896, concealment of the sale being therein alleged, and the pre-emptor, when examined before issues were framed, pleaded fraud by which he had been deceived. The first Court decreed the claim, finding that the fact of the sale became known to plaintiff on the 1st October 1895, and that there had been fraudulent concealment thereof, but the Divisional Judge, on appeal, dismissed the suit as barred by limitation, calculating either from the date of registration or from the 19th September 1894.

Plaintiff appealed to the Chief Court, and in addition to the facts above-mentioned, on which his allegation of fraudulent concealment was based, further urged in support of such allegation the fact that on the death of the vendor in 1881, his son was recorded as owner in his place.

Held, that though each of the facts above set forth, when taken alone, might be merely suspicious, yet when found to concur, they established fraudulent concealment within the meaning of Section 18 of the Limitation Act.

Held, further, that, fraudulent concealment having been established respondent, upon whom the *onus* rested, had not proved that the appellant had knowledge of the sale more than one year before suit, which was therefore within time

12

Fraud—Punjab Land Revenue Act, 1887, Section 158 (2) (xvii), (xviii).—*Suit to set aside award of arbitrators appointed by Revenue Officer in partition proceedings—Allegation of fraud, but no dispute as to title.*—Plaintiffs sued to set aside an award of arbitrators appointed by a Revenue Officer, under Chapter X of the Punjab Land Revenue Act, 1887, in a dispute between the parties about partition of land. No question as to title was raised, but plaintiffs sued on the ground of fraud, inasmuch as they had not been given the land which had been promised to them.

Held, that the suit would not lie, plaintiffs' only course being to press their objections before the Revenue Officer, and thereafter appeal to the superior Revenue authority

52

G.

General Clauses Act, 1868.—Pre-emption—Punjab Laws Act, 1872, Section 9—Rights to use water of perennial stream—"Immovable property"—General Clauses Act, 1868, Section 2 (5).

Held, that inasmuch as the water of a perennial stream comes out of land, the right to use such water is "a benefit arising out of land," and is, therefore, "immovable property" within the meaning of Section 2 (5) of the General Clauses Act, 1868, so as to found a suit for pre-emption in respect of a sale thereof under Section 9 of the Punjab Laws Act, 1872

11

Gossain Fakirs.—See *Abandonment of Wordly Affairs*.

Government Ferry.—*Suit by Lessee of, for recovery of tolls.*—See *Small Cause Court Act, 1887, 2nd Schedule, Article 13.*

The references are to the Nos. given to the cases in the "Record."

No.

Guardian and Ward.—*Res judicata*—*Omission by guardian ad litem of minor to appeal against decree*—*Gross negligence on part of guardian*—*Effect of such decree.*—Where in a previous suit a decree was passed against the present plaintiff, who at the time was a minor, and was duly represented by his mother as his guardian *ad litem*, held, that the omission by the latter to appeal on his behalf from such decree, notwithstanding that there were excellent grounds, both in law and on the facts, for an appeal, amounted to gross negligence on her part, and that under such circumstances it would be contrary to law and equity to hold the plaintiff bound by the former decree.

The position of a guardian *ad litem* of a minor being that of a trustee, he is bound strictly to act in the interests of the minor, and he has not the liberty, as long as he retains his position, of abandoning the case as he would have were it his own, unless such abandonment is clearly in the interests of the minor. Every case must be judged by its own facts, and for the purpose of finding out whether such guardian was guilty of laches or fraud in previous proceedings, the Court has power to go into them and to form its own conclusions regarding them

35

Guardian and Wards Act, 1890.—*Application to remove guardian on ground of failure to furnish security*—*Ex-parte order removing guardian*—*Application to set aside ex-parte order procedure.*—Appellant was duly appointed guardian and received a certificate, but the order of the Court appointing him, while directing him to file security, did not specify the amount thereof, or the time within which it was to be filed. Subsequently, on an application by respondent, the District Judge in an *ex-parte* order directed that the guardian should be removed on the ground that he had not furnished security within a reasonable time. The guardian's application to have the *ex-parte* order set aside was rejected on the ground that his only remedy was by way of appeal therefrom.

Held, that the District Court had erred in holding that the application to have the *ex-parte* order set aside could not be entertained, the provisions of the Civil Procedure Code as regards procedure being applicable to cases under the Guardian and Wards Act, unless the contrary is expressly declared.

Held, further, that the guardian should not have been removed for failure to give security, until a distinct order had been passed fixing the amount and the time within which it was to be filed, and the guardian had thereafter failed to comply with such order ...

7

" " " " " **Guardian and Wards Act, 1890, Sections 12 (3) (b), 47**—*Preliminary order as to custody of property*—*Revision*—*Civil Procedure Code, 1882, Section 591.*—At the hearing of an application under Act VIII of 1890 for the custody of the person and property of a minor at the time living with his step-mother, the Court by an interlocutory order issued a commission to a certain Munsif to make a list of the property of the minor and to lodge it in Court for safe custody, care being taken that the stepmother was given the necessary utensils, clothes, &c., for her support and maintenance. The step-mother applied to the Chief Court on the revision side to set aside the said

The references are to the Nos. given to the cases in the "Record."

No.

order, but it was objected on behalf of the respondent that, inasmuch as an appeal from the final order of the lower Court in this case lay to the Chief Court, the order in question was not open to revision. On behalf of petitioner it was contended that, the property affected being in her possession, no order passed in appeal could remedy the injury caused by the order, which was *ultra vires* with reference to the provisions of Section 12, sub-section (3), clause (b), of Act VIII of 1890, and, further, that the petitioner was not bound to appeal against an order appointing the respondent guardian, while, in the event of his application being dismissed, she could not appeal against the order in question, which in any event did not affect the decision of the case, in the terms of Section 591 of the Civil Procedure Code.

Held, that the order in question being passed by the Court for the temporary custody and protection of the minor's property, and the custody of the Munsif being in effect the custody of the Court, did not violate the rule contained in Section 12 (3) (b) of Act VIII of 1890, and that the words "any person" in the said clause could not be interpreted to include the words "the Court."

The Court being satisfied that this was not a case in which the revisional powers of the Court should be exercised, dismissed the application

10

Guardian and Wards Act, 1890.—Guardian and Wards Act, 1890, Sections 3, 7—"Will or other instrument"—Nuncupative will—Appointment of minor's heir as guardian of property.

Held, that the provisions of Section 7 of the Guardian and Wards Act, 1890, do not apply to nuncupative wills.

Held, further, that inasmuch as a minor's heir is peculiarly interested in the good management of the property to which he hopes to succeed, there is no objection to the appointment of such a person as guardian of the minor's property as distinct from the minor's person

54

H.

*Hindu Law—Adoption.—Adoption of brother-in-law's son—Hindu Law or Custom—Sikh Khatri of Rawalpindi—Burden of proof—"Agricultural tribe."—One K. S., a Sikh Khatri, of the Bindra section, having adopted G. S., his wife's brother's son, plaintiff sued for a declaration that the adoption was invalid by custom and would not affect his reversionary rights. It appeared that the families of plaintiff and K. S. had held land for at least two generations, and that the total ancestral land in the possession of K. S. was about 4 *ghumaos* 5 *kanals*. The lower Courts decreed plaintiff's claim on the ground that defendants had failed to prove that the said adoption was valid by custom.*

Held, that though the primary rule of decision in a suit of the present character is custom, there is no necessary legal presumption that a particular custom bearing on the point in issue exists, Section 5 of the Punjab Laws Act, 1872, only casting on the Court the duty of enquiring whether there is any such custom binding on the parties, and, if there is, to decide the suit in accordance therewith.

The references are to the Nos. given to the cases in the "Record."

No.

Held, further, that under Hindu Law, which was the personal law of the parties, the adoption in question was perfectly valid.

Held, therefore, that plaintiff who was suing to set aside an adoption, which was valid by the personal law of the parties, on the ground that it was invalid by custom, must fail if the custom upon which he relied was not proved, and that he was accordingly bound by the rules of pleading to establish that custom affirmatively.

Held, further, that inasmuch as Khatris do not ordinarily form an agricultural but a trading community, the usages of agriculturists cannot be presumed to apply to them, and therefore that plaintiff could not claim the benefit of the presumption laid down by the Full Bench in No. 50, *Punjab Record*, 1893, so as to shift the burden of proof from himself to defendants.

Found, upon the evidence, that plaintiff had failed to prove that by custom among the parties the adoption of a wife's brother's son was invalid

94

Hindu Law.—Adoption of daughter's son—Hindu Law—Baniyas of Jagraon—Burden of proof—Omission to perform certain ceremonies.—Plaintiff sued for a declaration that a deed of adoption whereby defendant No. 1, plaintiff's brother, adopted his daughter's son, was invalid, and would not affect plaintiff's reversionary rights. Plaintiff admitted the *factum* of adoption, but contended that it was illegal by "law and custom," and was, moreover, invalid owing to the non-performance of certain necessary ceremonies. The parties were *baniyas* of Jagraon. The lower Courts dealt with the question as one of custom, and dismissed the suit on the ground that the adoption had not been proved to be invalid by custom among the parties.

Held, that the parties being *bania* residents of a town, of the ordinary mercantile class, were governed by Hindu Law and not by custom, and that plaintiff had failed to prove that under Hindu Law a daughter's son was not a proper person to be adopted.

Held, further, that the *factum* of adoption not being disputed, and the daughter's son being a person who might legally be adopted, the adoption was not invalid on account of the omission of any particular ceremony.

I. L. R., XVII All., 294, followed

97

Hindu Law—Alienation.—Hindu Law—Liability of son for father's debt—Onus of proving that debt was incurred for immoral purposes—Minor son—"Antecedent," meaning of.—There being no reason why a minor son should not just as much as an adult son be under a pious obligation to discharge his father's debts, the *onus* of proving that a father's debts were immoral, when it is sought to set aside an alienation by the father, lies no less upon minor sons than upon adult sons, the former being in no better position than the latter.

In 1892 one G. C. mortgaged six houses to one T. D. for Rs. 5,500 by two deeds, and out of the consideration Rs. 3,000 was for the payment of an antecedent debt and Rs. 2,500 was taken by G. C. in cash. G. C.

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No.

then rented the houses from T. D., and executed leases to him. In 1894 T. D. brought two suits against G. C. for possession of the houses, and obtained two decrees for possession with costs in the two cases amounting, respectively, to Rs. 329 and Rs. 327. On the 24th August 1895 T. D. executed the decrees for costs and attached the six houses, and further prayed that a sum of about Rs. 7,000 which was due to him under the mortgage-deed should be reserved and the houses sold, the proceeds being applied towards the satisfaction of the sums due on the decrees. The minor son of G. C. objected to the attachment, but his objection was dismissed. He accordingly filed the present suit on the 20th February 1896 for release of the houses from attachment, and it was contended on his behalf that G. C.'s debts were incurred for immoral purposes, and that the *onus* of proving that they were not so rested in this case upon T. D. because (a) the son was a minor, and (b) Rs. 2,500 of the original debt having been taken in cash by G. C. at the time of mortgage was not an antecedent debt.

Held, that the minority of the son was no reason why the burden of proof should be shifted from him.

Held, further, that inasmuch as there were decrees for Rs. 329 and Rs. 327 against G. C. at the time when plaintiff instituted the present suit, such decrees were antecedent debts which plaintiff was under a pious obligation to pay unless he could prove that they bore an immoral taint.

"Antecedent debt" means with regard to a mortgage "debt antecedent to the transaction," and in the case of a proceeding by suit "a debt antecedent to the suit."

I. L. R., XX Calc., 328, followed.

As regards the contention that though the amounts of the decrees might be antecedent debts, yet that this did not apply to the whole of the mortgage money due on the mortgages, *held*, that inasmuch as the decrees for possession and the order in execution for sale of the houses subject to T. D.'s mortgages substantially charged the whole mortgage-money on the property, plaintiff in suing to set aside orders passed against him in furtherance of T. D.'s remedy for his debt, was attempting to set up his right against the creditor's remedy for his debt, which on the authority of *I. L. R., XIII Calc., 21*, he could not be allowed to do.

Found, on the evidence, that plaintiff had failed to prove that the debts of G. C. were for immoral purposes. 72

Holiday—Hearing civil cases on.—See *Punjab Courts Act, 1884, Section 67*.

Husband and Wife.—*Punjab Courts Act, 1884, Section 40 (i) (ii)*—"Point of law involved"—*Question as to burden of proof—Separation deed between husband and wife—Allegations of misconduct on part of wife—Revision—Civil Procedure Code, Section 622.*

The Divisional Judge granted a certificate of appeal, under Section 40 of the Punjab Courts Act, to the effect that "a question of law is involved, namely, whether a child born in the lifetime of its father

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"is not presumed to be a legitimate one, and whether the *onus probandi* was not on the defendant-appellant to prove the unchastity of his wife, and whether it is not a question of 'no proof' about the finding of unchastity of the plaintiff-respondent, and that the case is, in my opinion, of sufficient importance to justify a further appeal."

Held, that the certificate on the question of *onus probandi* and the mode of decision was not one contemplated in the Act, and was bad.

Semle: The right construction of the word "involved" is that it applies to the case rather than to the appeal which is to be certified under sub-section (i) (d), or admitted under sub-section (ii) of Section 40 of the Act, and includes points which may be raised by way of defence in an appeal.

But, *held*, that the Divisional Judge had acted with material irregularity, within the meaning of Section 622 of the Civil Procedure Code, inasmuch as (1) he had started a new ground of defence not pleaded by the defendant, *viz.*, that the agreement for separation between the defendant and his wife (the plaintiff) was obtained under pressure, and should not be enforced; (2) he had absolved the defendant from liability, although finding that defendant had committed a breach of the agreement from the beginning; (3) he had wrongly decided the question of *onus* of proof as regards breach of the terms of the agreement, and (4) he had dealt in generalities and conjectures about plaintiff's general bad conduct instead of giving definite findings on the evidence as regards specific misbehaviour on her part.

Although Hindu Law does not recognize divorce, the marriage tie being indissoluble, yet where the finding of a Court, in a suit by the wife for maintenance, would put an end to the plaintiff's conjugal rights, make her an outcast, and probably drive her into the streets for her livelihood, the evidence as to adultery and immorality on her part should be of a definite character, as well as cogent and reliable, before the Court acts upon it for the purpose of dismissing her suit.

Section 622 of the Civil Procedure Code, lays down the conditions under which the Court may revise the proceedings of subordinate Courts, and its powers of interference is subject to these conditions. But once the jurisdiction to revise is established on any of the grounds specified in the first part of the said section, there is no limitation imposed on the power of the Court as to the mode of disposal. The section is intended to arm the Court with the power of remedying injustice in cases not subject to appeal under certain specified circumstances, and, therefore, when the grounds of jurisdiction are established and a fit case shown for the exercise of its powers, there is nothing in the section to preclude the Court from finally disposing of the case itself because points of fact, and not points of law, are involved.

The Court finding that defendant had entirely failed to prove breach of the conditions of the agreement between him and plaintiff on the part of plaintiff, or that the latter had been guilty of any immorality, set aside the order of the Divisional Court, and restored the decree which plaintiff had obtained in the first Court

The references are to the Nos. given to the cases in the "Record."

No.

Husband and wife.—Custody of wife—Conduct of husband—Discretion of Court.—
In suits for the custody of the person of a wife, the Court requires from the husband proof not merely that he is the husband of the woman, but also that he has done nothing to forfeit his right to such special relief by failure in his own duty towards his wife. He has to show not only that he is not estopped from exercising a claim or privilege, but that he has done his duty in the matter towards his wife so as to entitle him to claim this extreme exercise of authority on his behalf.

Where it appeared that plaintiff's wife, of whom custody was sought, had some time previously absconded with another man, against whom plaintiff instituted criminal proceedings under Section 498 of the Penal Code, which he subsequently compromised by divorcing his wife, and that the defendant, R. S., thereafter married the said woman by *karewa*, held, that inasmuch as plaintiff had done all he could to divest himself of connection with, and responsibility for, his wife; the Court was not justified in putting in force the discretionary power vested in it and giving plaintiff a decree for the custody of his wife

75

I.

Illegal Purpose—Money paid for. See *Contract Act*, 1872, Section 23, No. 2.

Immoral Contract.—See *Contract Act*, 1872, Section 23, No. 1.

"Immovable Property" 1 Suit for immovable property situate in different districts
—Joint suit by reversioners against person in wrongful possession.—See
Cause of Action.

" " *Pre-emption—Right to use water of perennial stream—*
" *"Immovable property."*—See *General Clauses Act*, 1868.

" " *Government ferry—"Immovable property"—Suit by lessee*
" *for recovery of tolls.*—See *Small Cause Court Act*, 1887, 2nd Schedule,
Article 13.

Imprisonment in execution of decree.—See *Civil Procedure Code*, 1882, Section 336.

Improvements by mortgagees in Possession.—See *Mortgage*, No. 6.

Inequitable bargain.—See *Promissory Note*, No. 1.

Interest.—Construction of document—Provision in mortgage-deed regarding interest.
—In the case of a mortgage-deed in which there is a rate of interest fixed, without any specific condition that its payment shall cease on a certain contingency, and a clause specifying a date of redemption and conditional sale, it is generally to be held on a consideration of all the terms of the deed taken together, in the absence of clear intention to the contrary, that the contract does not contemplate the cessation of interest from the date when the payment of the capital sum becomes due.

When, therefore, a mortgage-deed provided that the mortgagor was to remain in possession, paying interest on the mortgage-money at 6 per cent. per annum half-yearly; that on default of payment of

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interest compound interest was to be charged; that on default of payment of interest for four successive half-years, possession was to be given to the mortgage and the produce of the land was to be taken in lieu of interest; that the mortgaged property was to be redeemed within six years, and if not then redeemed, the mortgage was to become *ipso facto* a sale; and it appeared that there had been no breach of the condition regarding the failure to pay interest for four successive half-years previous to the end of the six years allowed for redemption, but that subsequently to the expiry of the said period, there had been a failure to pay interest for four successive half-years.

Held, that as there was no condition that interest should cease to run on the terms stated after the expiry of six years, defendant's failure to pay interest for four successive half-years after the expiry of the six years allowed for redemption was a clear breach of the terms of the contract and entitled plaintiff to obtain possession of the land as mortgagee, and that he was not bound to resort to the other relief, which he might have claimed, of foreclosure 77

J.

Joinder of Causes of Action.—See *Cause of Action*.

Joinder of parties.—*Pre-emption—Mortgage by conditional sale—Failure by pre-emptors to tender amount due on mortgage after notice, effect of—Plaintiff in pre-emption suit acting banami—Joint suit for pre-emption by numerous occupancy tenants—Price to be paid by pre-emptors on foreclosure of mortgage—Punjab Laws Act, 1872, Sections 13, 14, 15.*

Held, that in the case of a foreclosure of mortgage by conditional sale, the failure on the part of the pre-emptor to tender the amount due on the mortgage after notice duly served upon him, does not involve forfeiture of his right of pre-emption, the provision as to forfeiture contained in Section 14 of the Punjab Laws Act, which deals with sales, having been intentionally omitted in Section 15 of the Act which deals with foreclosures.

Held, further, that, though when it is proved that a plaintiff in a pre-emption suit is acting *banami* the Court should refuse the nominal plaintiff a decree, a plaintiff in such a suit is not disentitled to a decree merely because, in order to raise funds for the maintenance of his suit, he has entered into an agreement with other persons as to what he will do with the land if he gets it, any subsequent transfer of such land by the plaintiff after he has obtained it giving rise to a fresh cause of action to the other pre-emptors.

In a joint suit for pre-emption by several occupancy tenants and others it was objected on appeal that (1) the occupancy tenants had joined strangers in the plaint, (2) that plaintiffs were not the whole body of the occupancy tenants and (3) that as individual tenants they could not combine their claims in a single suit.

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Held, that the said objections were unfounded. If the list of plaintiffs included any persons who were not occupancy tenants, the proper course was to take the objection at the first hearing and have their names struck out, which could be done without altering the plaint generally or affecting the right of the remaining plaintiffs to claim the whole property. Moreover, as it was not disputed that each occupancy tenant could sue separately for the whole property, or that the whole property would be divided equally among those tenants who succeeded in obtaining a decree, there was no reason why the plaintiffs could not sue jointly, even upon the assumption that they did not represent the whole body of the tenants.

As regards the price to be paid by the pre-emptor, *held*, that he was entitled to take the property on foreclosure on payment, not of what was due on the mortgage, but of the market value only.

The mere fact that a pre-emptor in his eagerness to get the land and to outbid others, had professed himself ready to pay a sum considerably more than the market value, *held*, not to amount to an estoppel, it being established that such statement did not lead defendant to confess judgment or to do any other act which he would not have done had the statement not been made

19

Joinder of parties.—Joinder of parties.—Suit by representative of deceased mortgagee, who has obtained certificate under Act VII of 1889—Necessity of impleading mortgagee's other heirs—Act VII of 1889, Sections 4, 16.— Plaintiff sued on the allegations that in 1883 defendant No. 1 mortgaged two houses to plaintiff's father for Rs. 2,000 and agreed to pay interest thereon at a specified rate, and the principal on demand; that plaintiff's father had died, and that plaintiff had obtained a certificate, under Act VII of 1889, for realisation of the debts due to the deceased, including the amount due on the said mortgage; that defendant No. 2 had purchased the said houses in execution sale with full knowledge of plaintiff's rights, and was now in possession thereof, and that defendant No. 1 despite demand had failed to pay the principal money or any interest since *Sambat* 1945. Plaintiff therefore prayed for recovery of a sum of Rs. 3,192 and costs, with a lien on the property mortgaged and recoverable by auction sale, and that defendant No. 1 be made personally liable for the amount of the decree and future interest. For defendants it was contended that the suit must fail by reason of the non-joinder as co-plaintiff of the deceased mortgagee's other son and co-heir, the latter being equally interested with plaintiff in the mortgage-deed.

Held, that inasmuch as, according to the authorities, the relief sought in the present suit could not have been granted in its entirety without a certificate under Act VII of 1889, the certificate-holder, who represented the estate *qua* the particular debt just as fully as an executor or administrator, was entitled to sue alone without impleading the other heirs of the deceased mortgagee

99

Judgment—Death of plaintiff before.—See Civil Procedure Code, 1882, Section 365.

Jurisdiction.—Suit for possession of immovable property situate in different districts.—See Cause of Action.

The references are to the Nos. given to the cases in the "Record."

No.

Jurisdiction.—*Limitation Act, 1877, Section 14*—"Defect of jurisdiction or other like cause."—See *Limitation Act, 1877, Section 14*.

" *Punjab Municipal Act, 1891, Sections 91, 92, 94, 95*—*Refusal of Municipal Committee to sanction re-erection of a projection—Discretion of Committee—Jurisdiction of Civil Court—Compensation.*—See *Municipal Committee*.

" *Punjab Courts Act, 1884, Sections 26, 75*—"Business" and "functions" of District Court—Power of District Judge to assign function of trying a case to Additional District Court—Case in excess of pecuniary limits of latter Court's jurisdiction.—See *Punjab Courts Act, 1884, Section 75*.

Jurisdiction of Civil or Revenue Court.—*Landlord and tenant—Suit for possession by tenant who has been ejected—Suit instituted more than one year after ejectment—Punjab Tenancy Act, 1887, Sections 50, 77 (3) (9)—Jurisdiction of Civil Court.*—See *Landlord and Tenant, No. 3*.

" " " " *Suit to set aside award of arbitrator appointed by Revenue Officer in partition proceedings—Allegation of fraud, but no dispute as to title—Punjab Land Revenue Act, 1887, Section 158 (2) (xvii) (xviii).*—See *Partition, No. 2*.

" " " " *Partition—Right of widow who has succeeded to her husband's interests in joint holding to claim partition—Grant of such prayer by Revenue Officer—Jurisdiction of Civil Court to entertain subsequent suit by co-sharers objecting that widow is by custom not entitled to claim partition—"Question as to title"—"Owner" and "Landowner"—Punjab Land Revenue Act, 1887, Sections 111, 115, 116, 158.*—See *Partition, No. 3*.

Jurisdiction of Small Cause Court.—*Suit by lessee of Government ferry for recovery of tolls.*—See *Small Cause Court Act, 1887, 2nd Schedule, Article 13*.

K.

Khanadamadi—See *Custom II—Alienation, No. 5*.

L.

Landlord and Tenant.—*Landlord and Tenant—Right of landlord to claim rent from sub-lessee—Attornment by sub-lessee to stranger claiming title to property—Termination of tenancy—Punjab Tenancy Act, 1887, Section 58.*

Held, that upon the determination of a tenancy, it is the duty of the tenant not merely to relinquish possession of the premises, but to restore possession thereof to the landlord, and that if such tenant has underlet the whole or any portion of the premises, he will be liable for a breach of the obligation if his sub-tenant refuses or neglects to give up possession when the term ends.

An attornment made by a tenant or a sub-tenant to a stranger claiming title to the estate of the landlord is absolutely null and void, and the possession of such landlord is in no way affected or changed thereby.

The references are to the Nos. given to the cases in the "Record."

- No.
- Held*, further, that there being no privity of contract between the original lessor and a sub-lessee, the former is not entitled to claim rent from the latter, his remedy being only against the lessee with whom he made the contract.
- The provision in Section 58 of the Punjab Tenancy Act, 1887, is a special provision in a special enactment, and has no application to the ordinary law of landlord and tenant 14
- Landlord and Tenant.—Monthly tenancy—Transfer of Property Act, Section 106—Tenant holding over—Damages.*—Where a tenancy of certain shops was not for agricultural or manufacturing purposes, and the tenant failed to prove a contract for a lease from year to year, *held*, on the principal laid down in Section 106 of the Transfer of Property Act, that the tenancy was monthly, and that a notice of 15 days, terminating within a month of the tenancy, was valid.
- Held*, further, that the damages awardable by the Court against a monthly tenant who wilfully and contumaciously holds over, after notice, should be reasonable in amount 33
- " " *Landlord and Tenant—Suit by Tenant who has been ejected for possession—Suit instituted more than one year after ejectment—Punjab Tenancy Act, 1887, Sections 50, 77 (3) (g)—Jurisdiction of Civil Court.*
- Held*, that Section 50 of Punjab Tenancy Act, 1887, does not restrict the period of limitation allowed to a dispossessed occupancy tenant when suing for possession in the Civil Courts.
- Where, therefore, plaintiffs who had been ejected from their occupancy holding in 1888, sued in the Civil Court long before the expiry of twelve years.
- Held*, that plaintiffs' suit was not barred by Section 50 of the said Act 64
- " *"Landowner."—Partition—Right of widow who has succeeded to her husband's interests in joint holding to claim partition—Grant of such prayer by Revenue Officer—Jurisdiction of Civil Court to entertain subsequent suit by co-sharers objecting that widow is by custom not entitled to claim partition—"Question as to title"—"Owner" and "Landowner"—Punjab Land Revenue Act, 1887, Sections 111, 115, 116, 158.—See Partition No. 3.*
- " *Pre-emption—Punjab Laws Act, 1872, Section 12—Landowner and landholder—Purchaser of small plot of unculturable land.—See Pre-emption, No.*
- " *Land-suit.—Appeal—"Land suit"—Right in tank used for watering cattle and excavating earth to make bricks.*—Plaintiff sued for declaration of right in a tank, valued at Rs. 900, which was used for watering cattle and excavating earth to make bricks.
- Held*, that, as these were not agricultural purposes or purposes subservient to agriculture, the tank was not "land" as defined in the Punjab Tenancy Act, and that, therefore, no further appeal lay ... 48

The references are to the Nos. given to the cases in the "Record."

Legitimacy.—*Custom—Succession—Chaddar-andazi marriage, proof of—Legitimacy.*—See *Custom III—Inheritance, No. 4.*

" *Custom—Succession—Issue of woman whom a man could not legally marry, but treated by him as his wife.*—See *Custom III—Inheritance, No. 9.*

Lessee of Government ferry—*Suit by, for recovery of tolls.*—See *Small Cause Court Act, 1887, 2nd Schedule, Article 13.*

Lien.—See *Partnership, No. 2.*

Limitation Act, 1877.—*Section 10.—Vested in trust—Suit for recovery of money misappropriated by Khazanchi of Native State—Suit based on void judgment of foreign Court—"Defect of jurisdiction or other like cause."*—See *Section 14, infra.*

" " " *Section 14—Limitation Act, 1877, Sections 10. 14—"Vested in trust"—Suit for recovery of money misappropriated by Khazanchi of Native State—"Defect of jurisdiction or other like cause"—Suit based on void judgment of foreign Court.*—Section 10 of the Limitation Act, 1877, has a limited application, and does not cover a suit brought against the *khazanchi* of a Native State to recover money said to have been misappropriated by him from the money in his charge, such money not being "vested in trust for any specific purpose," within the meaning of the said section.

Neglect or laches of the plaintiff either in stating his case or prosecuting his suit is not "a defect of jurisdiction or other cause of a like nature," within the meaning of Section 14 of the said Act, and the inability of the Court to entertain the suit must arise from either some unavoidable circumstance over which no one has any control, or something incidental to the Court itself, and unconnected with the acts of the parties.

Where, therefore, a plaintiff sued in a Court of competent jurisdiction, but based his suit on a foreign judgment which was a mere nullity, *held*, that he was not entitled to any deduction of time, under Section 14 of the Act, by reason of such suit

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" " " *Section 18.—Pre-emption—Fraudulent concealment of sale—Limitation Act, 1877, Section 18, knowledge of facts, presumption as to.*—In a suit for pre-emption it appeared that the deed of sale, which was described in two places in itself as a mortgage-deed, was dated 12th December 1876, and was registered on the same date at the *tahsil*, three or four miles from the village in which the land in suit was situate; that the marginal witnesses were residents of villages other than that in which the vendor and vendee resided, and where the land was situate; that from 1876 till 1895 the vendee continued to be recorded, as before, as tenant of the said land, that on the 19th September 1894, a measurement clerk reported that a sale had taken place, and that the vendee was in possession; that on the 1st October 1895 mutation of names was effected in the vendee's favour by order of the *Tahsildar*, and that the residents of the village in which the land was situate, as a body, were not aware of the sale. The plaint was filed in February 1896, concealment of the sale being therein alleged, and the

The references are to the Nos. given to the cases in the "Record."

No.

pre-emptor, when examined before issues were framed, pleaded fraud by which he had been deceived. The first Court decreed the claim, finding that the fact of the sale became known to plaintiff on the 1st October 1895, and that there had been fraudulent concealment thereof, but the Divisional Judge, on appeal, dismissed the suit as barred by limitation, calculating either from the date of registration or from the 19th September 1894.

Plaintiff appealed to the Chief Court, and in addition to the facts above-mentioned, on which his allegation of fraudulent concealment was based, further urged in support of such allegation the fact that on the death of the vendor in 1881, his son was recorded as owner in his place.

Held, that though each of the facts above set forth when taken alone, might be merely suspicious, yet when found to concur, they established fraudulent concealment within the meaning of Section 19 of the Limitation Act.

Held, further, that fraudulent concealment having been established respondent upon whom the *onus* rested, had not proved that the appellant had knowledge of the sale more than one year before suit, which was therefore within time

12

Limitation Act, 1877—Section 26.—Easement—Right of way—Public or private road—"Question of law"—Limitation Act, 1877, Section 26.—User of road by public for less than 20 years.—Presumption as to dedication—English law.—The principles of the English law regarding the presumed dedication of a road to the public arising from user of such road by the public, being founded on reason and common-sense and conducive to public convenience, are applicable to India.

Held, therefore, that the user of a road by the public, openly and as of right, is sufficient, apart from the law laid down in the Limitation Act, 1877, Section 26, to raise a presumption of its dedication to their use, though such presumption might be rebutted by evidence of the owner's intention that the public should only have permissive user.

In the present case the evidence clearly showed that the road in dispute had been used as a public road for at least 10 years prior to suit, but the Divisional Judge, treating the case as one of prescription, found in favour of defendants because 20 years had not elapsed since the road was opened (Section 26 of the Limitation Act, 1877).

Held, under the circumstances as above set forth, that there was a presumption that the road had been dedicated to the use of the public and *found*, upon the evidence and facts of the case, that defendants had failed to rebut such presumption.

The right of the public to pass over a public road is not in the nature of an easement properly so-called, nor is it acquired by prescription under Section 26 of the Limitation Act, 1877.

A preliminary objection on behalf of defendants that there was no ground for admitting a further appeal in the case as there was no "question of law" involved, overruled on the grounds that the ques-

The references are to the Nos. given to the cases in the "Record."

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tions (a) whether plaintiff had not acquired a right of way over the road in dispute either by long user or grant; (b) whether the road came under the category of a public or a private road, involved consideration of points of law, and were not simple questions of fact.

Held, further, that the Divisional Judge's error in law in deciding the point under Section 26 of the Limitation Act, was of itself a sufficient ground for admitting a further appeal, though it was not the ground on which the appeal was admitted by the Judge in chambers

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Limitation Act, 1877.—Second Schedule, Article 93.—Limitation Act, 1877, Second Schedule, Article 93—Suit for declaration that an alleged will was a forgery, and that testator had no power to make such will—Custom—Succession of daughter.—See Custom III—Inheritance, No. 2.

" " " " " " *Article 141.—Mortgage by widow—Decree of foreclosure against widow—Regulation XVII of 1806—Regularity of proceedings, presumption as to—Suit by reversioners for recovery of land after death of widow—Limitation Act, 1877, Second Schedule, Article 141—Res judicata—Estoppel.*

Held, that as against a person in possession of land under a title created by a widow, or in virtue of a decree for possession obtained against a widow, the reversioners have, under Article 141 of the Limitation Act, twelve years from the date of the widow's death within which they can sue for recovery of the land.

Held, further, that where a suit is brought against a female heiress in possession in respect of any matter which strikes at the root of her title to the property, a decree fairly and properly obtained against her binds all the reversioners, but, inasmuch as the widow's estate is ordinarily a limited one, and as she represents the reversioners only in special cases, in order that such decree should bind the latter, it must be shown, in the first instance, that the litigation was one in which the entire interest in the estate she held in possession was at stake, and then, that she had sufficiently protected the reversioner's interests, and that there was a fair and proper inquiry.

A widow's position with reference to the reversioners' interests is like that of a trustee, and any failure or neglect on her part to defend those interests in any such litigation render a decree obtained against her valueless against the reversioners.

Where certain mortgagees had, during the widow's lifetime, obtained a decree of foreclosure against her under Regulation XVII of 1806, *held*, that as against the reversioners, who sued for recovery of the land after the death of the widow, the *onus* of proving that the said foreclosure proceedings were in due form, and that the right of redemption was extinct, was on the mortgagees, there being no presumption in favour of the regularity and propriety of such proceedings.

A plea of estoppel by conduct, *held*, not established

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" " " " " " *Article 141—Limitation Act, 1877, Articles 141, 142—Adverse possession—Suit by reversioners on death of widow.—In a case in which it was proved that adverse possession had begun against a certain widow, in 1882, that the said widow died in 1883, and that her reversioners sued in 1895 for possession.*

The references are to the Nos. given to the cases in the "Record."

No.

Held, that the reversioners' cause of action accrued on the death of the said widow, and that their suit, instituted within twelve years of that event, was within time.

Vundravandas v. Carsondas, I. L. R., XXI Bom., 646, approved ... 79

Limitation Act, 1877.—Second Schedule, Article 142.—See Article 141, supra. No. 2.

" " " *Document, construction of—Registration Act, 1877, Sections 17, 49—Partnership or co-ownership—Abandonment—Estoppel—Limitation Act, 1877, Second Schedule, Articles 142, 144.—See Registration Act, 1877, Section 17.*

" " " " *Article 144.—Document, construction of—Registration Act, 1877, Sections 17, 49—Partnership or co-ownership—Abandonment—Estoppel.—See Registration Act, 1877, Section 17.*

" " " " *Article 179.—Civil Procedure Code, 1882, Section 108—Money paid into Court—Ex-parte decree upheld—Application by decree-holder for payment of deposit—Execution of decree—Limitation Act, 1877, 2nd Schedule, Article 179.—See Civil Procedure Code, 1882, Section 108.*

" " " " *Article 179.—Execution of decree—Limitation—Civil Procedure Code, 1882, Sections 230, 235—Limitation Act, 1877, 2nd Schedule, Article 179 (iv).—See Civil Procedure Code, 1882, Section 230.*

" " " " *Article 179—Pre-emption—Decree directing money to be paid into Court by certain date, but not stating consequences of non-compliance—Execution of decree—Limitation Act, 1877, 2nd Schedule, Article 179.—Where a decree in a suit for pre-emption directed that the sum for which pre-emption was decreed should be paid into Court by a certain date, but omitted to declare that if such sum was not paid on or before the said date, the suit should stand dismissed. Held, that such omission in the decree did not extend the time within which the plaintiff could pay the money, the plaintiff being bound, nevertheless, to pay the amount into Court within the time fixed.*

In such a case when the plaintiff failed to pay the amount into Court within the specified time,

Held, that the decree had become one incapable of execution, and was not governed by Article 179 of the Limitation Act, which only applies to decrees capable of execution 47

Lis pendens.—Lis pendens—Registered and unregistered deeds—Registration Act, 1877, Section 50.—Section 50 of the Registration Act, 1877, gives priority to registered documents of certain specified classes, as regards property comprised therein, over unregistered documents relating to the same property, not being decrees or orders, provided, in the latter case, that such decrees or orders are prior in point of date to the registered document.

Where, however, an unregistered mortgagee had already brought his suit to enforce his mortgage, *held*, that a mortgage, by registered deed, of the same property made during the litigation must, in accordance with the principles of *lis pendens*, be treated as subject to the result of the suit 32

The references are to the Nos. given to the cases in the "Record."

No.

Marriage.—*Custom—Succession—Chaddarandazi marriage, proof of—Legitimacy.*

See Custom III.—Inheritance, No. 4.

" *Marriage of minor without consent of paternal relations—Respective rights of minor's husband and paternal uncle.—See Minor.*

" *Material Irregularity.*—*See Revision in Civil Cases.*

Merger of Mortgage in sale.—*See Mortgage, No. 7.*

Minor.—*See Guardian and Ward.*

" " " " *Wards Act, 1890.—Hindu Law—Alienation.*

Custody of minor—Marriage of minor without consent of paternal relations—Respective rights of minor's husband and paternal uncle.—A minor girl, aged about 8 years, whose father was dead and whose mother could not be found, was given in marriage to respondent by her maternal grandmother without the consent of appellant, the minor's paternal uncle. The latter applied for the guardianship of the minor, but the District Judge dismissed his application on the ground that, if the marriage was unlawful by reason of the grandmother's incompetency to celebrate it, applicant was "at liberty to seek his remedy in a Civil Court."

Held, that the right of giving the minor in marriage lay with the appellant, and that even if a marriage had taken place between respondent and the minor, the respondent did not thereby acquire the right of guardianship when the paternal relations did not consent to the marriage 26

Misjoinder of Causes of Action.—*See Cause of Action.*

Misjoinder of Parties.—*See Joinder of Parties.*

Money paid to agent for unlawful purpose.—*See Principal and Agent.*

Monthly tenant holding over.—*See Landlord and Tenant, No. 2.*

Mortgage.—*Adverse possession—Mortgagee in possession—Adverse possession as regards mortgagee, effect of, upon rights of mortgagor.—See Adverse Possession, No. 1.*

" *Joinder of parties—Suit by representative of deceased mortgagee who has obtained certificate under Act VII of 1889—Necessity of impleading mortgagee's other heirs.—See Joinder of Parties, No. 2.*

" *Mortgage by widow—Decree of foreclosure against widow—Regulation XVII of 1806—Regularity of proceedings, presumption as to—Suit by reversioners after death of widow.—See Limitation Act, 1877, 2nd Schedule, Article, 141.*

" *Mortgage by conditional sale—Pre-emption—Failure by pre-emptor to tender amount due on mortgage after notice—Plaintiff in suit for pre-emption acting banami—Joint suit for pre-emption by several occupancy tenants—Sum payable by pre-emptors on foreclosure of mortgage.—See Pre-emption, No. 5.*

The references are to the Nos. given to the cases in the "Record."

No.

Mortgage.—*Mortgage-deed relating to immovable property—Deed compulsorily registrable, but registered in wrong Registry Office—Admissibility of deed in evidence—Fraud.—See Registration Act, 1877, Section 49.*

- ” *Mortgagor and mortgagees—Compensation for improvements by mortgagor, Regulation XVII of 1806.*—In 1872 plaintiff's father mortgaged a certain house to defendants' father and made over possession thereof to the latter. The mortgage-deed provided that the property should be redeemed within one year on payment of Rs. 900 principal and Rs. 7 on account of costs of a suit, the decree in which, in favour of defendants' father, formed the consideration for the mortgage. In default, it was provided that the mortgage should become a sale. The deed made no provision as regards the mortgagee's right to make repairs or improvements. The evidence established that the house at the time of mortgage was a *kacha* one, and that some seventeen years before suit it actually fell down owing to this cause, and was rebuilt by the mortgagee, without any objection on the part of plaintiff who was living in the neighbourhood, in a more substantial condition. Plaintiff having sued for redemption, defendants pleaded that the mortgage had under the terms of the deed become a sale, and that, in any event plaintiff could not redeem the property without paying for the improvements effected thereto. The lower Court decided against defendants on both points, and they appealed to the Divisional Court, but only on the ground that they were entitled to compensation. The Divisional Judge found that defendants were entitled to Rs. 429-10-0 as compensation out of the Rs. 1,200 claimed by them. On appeal to the Chief Court it was

Held, that the mortgagee had a right to rebuild the house in order to keep up his security, and in rebuilding it was authorised to make it more substantial, provided the work was done providently and without any unnecessary expense, and that the mortgagee was, therefore, entitled to be recouped for the outlay, which was under the circumstances a reasonable one, to the extent that the mortgagor would derive benefit therefrom.

Found, on the evidence, that the amount decreed by the Divisional Judge as compensation was proper and reasonable

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- ” *Suit to contest validity of sale—Right of plaintiffs to attack mortgage made in favour of vendee more than 12 years before suit—Merger of mortgage in sale—Limitation Act, 1877.*—In a suit in which plaintiff prayed for a declaration that a certain sale of land would not affect his reversionary rights, and it appeared that the said land had been mortgaged to the subsequent vendee more than 12 years before suit,

Held, that there was nothing in the provisions of the Indian Limitation Act of 1877 which prevented the plaintiff in such suit from attacking the said previous mortgage, and that it could not be held in a suit regarding the subsequent sale, that the title of the mortgagee had acquired validity by prescription.

But, *held*, that there was a presumption, which had not been rebutted, that the mortgagee intended to keep alive the charge created by the previous mortgage-deed, and that it was not merged in the subsequent sale.

The references are to the Nos. given to the cases in the "Record."

No.

Held, therefore, that plaintiff was entitled to a declaration, that the sale would not affect his reversionary rights, but that such declaration could not affect the rights of the mortgagee under the previous mortgage 71

Mortgage.—*Construction of document—Provision in mortgage-deed regarding interest.*—In the case of a mortgage-deed in which there is a rate of interest fixed, without any specific condition that its payment shall cease on a certain contingency, and a clause specifying a date of redemption and conditional sale, it is generally to be held on a consideration of all the terms of the deed taken together, in the absence of clear intention to the contrary, that the contract does not contemplate the cessation of interest from the date when the payment of the capital sum becomes due.

Where, therefore, a mortgage-deed provided that the mortgagor was to remain in possession, paying interest on the mortgage-money at 6 per cent. per annum half-yearly; that on default of payment of interest compound interest was to be charged; that on default of payment of interest for four successive half-years, possession was to be given to the mortgagee and the produce of the land was to be taken in lieu of interest; that the mortgaged property was to be redeemed within six years, and if not then redeemed, the mortgage was to become *ipso facto* a sale; and it appeared that there had been no breach of the condition regarding the failure to pay interest for four successive half-years previous to the end of the six years allowed for redemption, but that subsequently to the expiry of the said period, there had been a failure to pay interest for four successive half-years,

Held, that as there was no condition that interest should cease to run on the terms stated after the expiry of six years, defendant's failure to pay interest for four successive half-years after the expiry of the six years allowed for redemption was a clear breach of the terms of the contract, and entitled plaintiff to obtain possession of the land as mortgagee, and that he was not bound to resort to the other relief, which he might have claimed, of foreclosure 77

Muhammadan Law.—*Pre-emption—Death of claimant pendente lite—Abatement of suit—Punjab Laws Act, 1872, Section 5.*—See *Pre-emption*, No. 12.

Municipal Committes.—See *Punjab Municipal Act, 1891, Section 45.*—*Punjab Municipal Act, 1891, Sections 91, 92, 94, 95—Refusal of Municipal Committee to sanction re-erection of a projection—Discretion of Committee—Jurisdiction of Civil Court—Compensation.*—Sections 92 and 150 of the Punjab Municipal Act, 1891, provide for the disposal of certain matters by a Municipal Committee and the Commissioner, and a Civil Court has no jurisdiction to interfere with the discharge of their powers and duties by either. But when it is alleged that action has been taken by the Committee *ultra vires*, or in bad faith, or which is not covered by the authority of the Act, the Court has the power to enquire into the matter, and if it finds that the action complained of is not covered by the powers given to such Committee under the Punjab Municipal Act, 1891, or any other Act, the Court can grant relief which in certain cases would take the form of an injunction.

The references are to the Nos. given to the cases in the "Record."

No.

In a case where a Municipal Committee refused to permit plaintiff to re-erect a certain construction which he had pulled down and wished to rebuild, except in accordance with the Committee's bye-law, whereupon plaintiff sued in Civil Court for a decree that the Committee had no right to interfere with his rebuilding, and that they should not so interfere.

Held, that whether or not plaintiff was entitled to rebuild the construction without the permission of the Committee (a point not before the Court), his right to do so was not indefeasible, but must come to an end as soon as the Committee chose to exercise their powers under Section 91 or Section 95 of the Act, a matter entirely within their discretion, and in which they were not liable to be controlled by the Civil Court, or, if so liable at all, only when they exercised their discretion in a capricious, wanton and oppressive manner

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N.

Negligence on part of Guardian.—See *Guardian and Wards*.
Nuncupative Will.—See *Guardian and Wards Act*, No. 3.

O.

Oaths Act, 1873.—*Oaths Act*, 1873, Section 11—*Evidence given by person on oath, effect of, as regards person offering to be bound thereby*—*Civil Procedure Code*, 1882, Section 562.—Under Section 11 of the *Oaths Act*, 1873, the evidence given by a person on oath is, as regards the party who offered to be bound thereby, conclusive proof merely of the matter stated and of nothing further.

Where, therefore, in a suit by plaintiff for Rs. 550 profits lost by plaintiff through the default of N. C., and another, defendants, to deliver gram during one month at contract rate, and for Rs. 80 earnest-money paid to N. C., it appeared that one D. D., defendant, who made the contract as a broker and was alleged to have been a surety for its due performance, challenged N. C. to the oath, saying that if N. C. would swear that he (N. C.) had not received the earnest-money, he himself would be responsible for the plaintiff's claim, and the said N. C. thereupon swore that he had not received the said earnest-money, *held*, that such statement, on oath, merely concluded the question whether N. C. had or had not received such earnest-money.

Held, therefore, that the first Court had erred in regarding the oath so taken as *per se* sufficient ground for decreeing the suit as against D. D., and dismissing it as against the other defendants.

Held, further, that inasmuch as the first Court had decreed the suit merely on the oath taken, and had not decided any of the five issues which it had framed, the lower Appellate Court had rightly remanded the case under Section 562 of the *Civil Procedure Code*

45

Occupancy Rights.—*Occupancy rights, succession to*—*Adopted son*—*Punjab Tenancy Act*, 1887, Sections 5, 59—*Plea raised in Appellate Court for the first time*.

The references are to the Nos. given to the cases in the "Record."

No.

Held, that a daughter's son, who has been adopted, is not entitled, by virtue of clause (3) of Section 5 of the Punjab Tenancy Act, to succeed to the occupancy rights of his adoptive father who was a tenant under the said section, and that the objection to such succession can be taken by the male collaterals of the tenant as well as by the landlord.

The proviso in clause (3) of Section 5 of the Act refers only to the original acquisition of the right.

An Appellate Court is entitled to take notice of a question of law which clearly arises in the case, even though the question may have been overlooked both by the parties to the case and by the Courts which have dealt with it 22

Occupancy Rights—Occupancy rights—Alienation by widow in favour of proprietor—Right of reversioner to object—Punjab Tenancy Act, 1887, Section 59 (3).

Held, that a mortgage of occupancy rights by a widow is void under Section 59 (3) of the Punjab Tenancy Act, 1887, and none the less so because such mortgage is in favour of some of the proprietary body. *

Held, also, that plaintiff, as the reversionary heir to the widow and a co-sharer with her in the holding which was undivided, was entitled to sue for a declaration that such mortgage was void 39

" " *Punjab Tenancy Act, 1887, Sections 53, 56, 60—Unauthorized alienation of occupancy rights—Customary right of collaterals to object to alienation.*

Held, by the Full Bench, that when an occupancy tenant has not complied with the provisions of Sections 53 and 56 of the Tenancy Act, 1887, by giving notice to the landlord of his intention to alienate, or obtaining the landlord's previous consent in writing, the alienee obtains no indefeasible title to the tenancy under the Act, such alienation being voidable under Section 60 of the Act at the instance of the landlord, or by a collateral under customary law if the collateral is able to establish the custom.

In considering whether such custom exists the Court may take into consideration the custom applicable as regards alienations of proprietary rights, a very strong inference arising from the existence of the custom in the latter case that it exists also in the former case 89

"*Omnia rite esse acta.*"—See *Limitation Act, 1877, 2nd Schedule, Article 141.*

"*Owner*" and "*Landowner.*"—See *Partition, No. 3.—Pre-emption, No. 11.*

P.

Fagwand or Chundawand.—See *Custom III—Inheritance, No. 7.*

Parties—joinder of.—See *Joinder of Parties.*

Partition.—*Civil Procedure Code, 1882, Section 43—Application to Revenue Officer for partition of land—Question of title decided by said officer—Subsequent suit for possession of house—Title to land and house identical—Punjab Land Revenue Act, 1887, Section 117.*—In previous partition proceedings, relating to certain land and between the parties to the present

The references are to the Nos. given to the cases in the "Record."

No.

suit the Revenue Officer, before whom the proceedings were instituted, passed an order under Section 117 of the Land Revenue Act, to the effect that he would himself inquire into and determine the question of title that had been raised. Subsequently the present plaintiffs filed an application, upon which they paid the full stamp necessary for a civil suit, but which was not in the form of, or verified as, a plaint, and contained no statement of claim beyond a reference to the said order, and a statement that a separate suit would be brought for possession of a house connected with the land. The application was, however, registered in the register of civil suits, the order that it should be so registered and the summons issued being signed by the said officer, who was an Extra Assistant Commissioner, as "Munsif, 1st class." The officer then proceeded under Section 117 (2) (b) of the Land Revenue Act, and gave plaintiff a decree in respect of the land, the judgment being signed by him as "Assistant Collector," and the decree as "Munsif, 1st class." Plaintiffs having subsequently sued for possession of the house mentioned in their said application, defendants pleaded that the suit was barred under Section 43 of the Civil Procedure Code, on the ground that the decree in the partition proceedings had been passed by the Extra Assistant Commissioner, purely in the exercise of his civil powers as a Munsif, 1st class, and that therefore the claim to the house could have been made before him and determined in those proceedings. It was admitted that plaintiff's title to the land and to the house was the same.

Held, that the Extra Assistant Commissioner had clearly intended in the partition proceedings to act under Section 117 (2) (b) of the Land Revenue Act, as a Revenue Officer, and that his jurisdiction was confined to the question of title to the land which alone was the subject of those proceedings.

Held, therefore, that inasmuch as no claim to the house could have been included in the former proceedings, the present suit was not barred under Section 43 of the Civil Procedure Code

30

Partition.—*Punjab Land Revenue Act, 1887, Section 158 (2) (xvii), (xviii)*—*Suit to set aside award of arbitrators appointed by Revenue Officer in partition proceedings—Allegation of fraud, but no dispute as to title.*—Plaintiffs sued to set aside an award of arbitrators appointed by a Revenue Officer, under Chapter X of the Punjab Land Revenue Act, 1887, in a dispute between the parties about partition of land. No question as to title was raised, but plaintiffs sued on the ground of fraud inasmuch as they had not been given the land which had been promised to them.

Held, that the suit would not lie, plaintiffs' only course being to press their objections before the Revenue Officer, and thereafter appeal to the superior Revenue authority

52

" *Partition—Right of widow who has succeeded to her husband's interests in joint holding to claim partition—Grant of such prayer by Revenue Officer—Jurisdiction of Civil Court to entertain subsequent suit by co-sharers objecting that widow is by custom not entitled to claim partition—" Question as to title"—"Owner" and "Landowner"—Punjab Land Revenue Act, 1887, Sections 111, 115, 116, 158.*

The references are to the Nos. given to the cases in the "Record."

No.

Held, by the Full Bench, that though a widow who succeeds to her husband's interests in a joint holding on a life tenure and is recorded as a joint-owner in the Revenue papers, is entitled, as being "an owner" within the meaning of Section 111 of the Punjab Land Revenue Act, 1887, to apply for partition before a Revenue Officer, who has a discretion to either grant or refuse her prayer, it is open to the co-sharers, in the event of her prayer being so granted, to seek relief in the Civil Court on the ground that the widow was by custom not entitled to claim partition, such objection on their part raising a question of title in the land sought to be partitioned and therefore giving the Civil Court jurisdiction to entertain the suit

82

Partnership.—*Document, construction of—Registration Act, 1877, Sections 17, 49—Partnership or co-ownership—Abandonment—Estoppel—Limitation Act, 1877, 2nd Schedule, Articles 142, 144.*—Plaintiff sued for an account of the income and expenditure of a certain *kul* (or water-course) jointly excavated by the parties under an agreement in writing, dated 24th February 1873, whereby it was agreed, *inter alia*, that, in consideration of half the outlay in excavating the *kul*, which originally belonged to defendant and his ancestors, but had fallen into disrepair and become useless, the plaintiff was to become a half-sharer therein; that thenceforth the income and expenditure on the *kul* was to be shared in the same proportion, and that in the event of a sharer failing to pay the expenses of repairs, he was to be debarred from participating in the income of that year. Defendants admitted the agreement and rendition of accounts till 1936 Sambat, but alleged that after that year the *kul* was stopped and litigation ensued with the owners of certain villages; that plaintiff refused to contribute towards the expenses and gave up his share; and that defendants had conducted the cases themselves and enjoyed the profits of the *kul* ever since.

The District Judge dismissed the suit on the ground that plaintiff, by refusing to contribute towards the expenses of the said litigation and by his subsequent conduct, had abandoned and lost his rights in the *kul*. This decree was upheld, on appeal, by the Divisional Judge, both on the ground that plaintiff had abandoned and lost his said rights, and also that his conduct estopped him from preferring the present claim.

Plaintiff having appealed to the Chief Court, the defendants supported the decree of the lower Courts, not only on the ground of abandonment and estoppel, but also on the grounds (a) that plaintiff's rights in the *kul* could not be proved, as the written agreement of 1873 required registration, and being unregistered was inadmissible in evidence; (b) that the suit was practically one for accounts of a partnership, and therefore could not lie without a prayer for dissolution; and (c) that the failure of plaintiff to contribute towards the expenses of repairs debarred him from claiming a share of the produce for any of the years for which accounts were claimed.

Held, that the claim was one relating to profits of immovable property, and that the right in respect of which the parties were litigating and which formed the basis of the claim was one regarding such property, and that, therefore, the limitation for the possession of a share in the *kul* would be 12 years, whether under Article 142 or Article 144 of the Limitation Act.

The references are to the Nos. given to the cases in the "Record."

No.

Found, upon the evidence, that there was no proof of abandonment on the part of plaintiff.

Held, futher, that the written agreement of 1873 did not require registration, inasmuch as taken as a whole, it meant nothing more than that defendant agreed to give plaintiff a half share in the *kul* provided that the latter paid a half share of the expenses of excavation, and that such a condition did not create a present right in the *kul*, but merely one that would come into existence in the event of plaintiff fulfilling the said condition.

Held, also, that even if it were conceded that a present right was created by the instrument it was only a right in the ruined *kul*, which had at the time no value at all, and certainly could not be said to have been worth Rs. 100, and that the valuable property which might come into existence if the conditions of the agreement were carried out could not be held to furnish the test of valuation.

Section 17 of the Registration Act must be strictly construed, and unless a document is clearly brought within the purview of the section, it cannot be excluded from evidence, and, in case of doubt, the benefit must be given to the document.

Held, upon the facts of the case, that the claim was one for accounts of a co-ownership in immoveable property and not of a partnership.

Held, finally, that the agreement, rightly construed, only deprived a co-sharer of the income in case he *refused* to pay his *quota* of expenses of repairs, &c., and that mere *non-payment* did not amount to such refusal, though defendant was entitled to deduct the amount of the said expenses from plaintiff's share of the profits

51

Partnership—Lien—Contract Act, 1872, Sections 60, 61, 217, 262—Set off—Civil Procedure Code, 1882, Section 111.—The rule as to the equitable lien possessed by each partner on the partnership property cannot be applied so as to enable a managing partner to appropriate money due to another partner out of the assets of a firm in liquidation of a debt due from that partner to himself and entirely unconnected with the business of the firm.

Neither at common law nor in equity is there any right of set-off between parties mutually indebted in the absence of an agreement to that effect. Nor do the provisions of Section 111 of the Civil Procedure Code apply where the debt sought to be set-off was barred by limitation before the suit was filed

53

Perversion to Muhammadanism.—See *Custom I.—Adoption, No. 2.*

Plaint.—*Order of Appellate Court returning plaint for amendment—Appeal.*—See *Civil Procedure Code, 1882, Section 588 (b).*

Plaintiff, death of.—See *Civil Procedure Code, 1882, Section 365.—Pre-emption, No. 12.*

Pleader, power of, to compromise suit.—See *Civil Procedure Code, 1882, Section 375.*

Possession, suit for, by tenant after ejectment.—See *Landlord and Tenant, No. 3.*

The references are to the Nos. given to the cases in the "Record."

No.

Pre-emption.—*Civil Procedure Code, 1882, Section 244—Decree for pre-emption—Question whether decree-holder has paid money into Court within time.—See Civil Procedure Code, 1882, Section 244.*

" *Pre-emption—Fraudulent concealment of sale—Limitation Act, 1877, Section 18, knowledge of facts, presumption as to.—See Limitation Act, 1877, Section 18.*

" *Pre-emption—Decree directing money to be paid into Court by certain date, but not stating consequences of non-compliance—Execution of decree—Limitation Act, 1877, 2nd Schedule, Article 179.—See Limitation Act, 1877, 2nd Schedule, Article 179, No. 3.*

" *Pre-emption—Punjab Laws Act, 1872, Section 9—Rights to use water of perennial stream—"Immovable property"—General Clauses Act, 1868, Section 2 (5).*

Held, that inasmuch as the water of a perennial stream comes out of land, the right to use such water is "a benefit arising out of land," and is, therefore, "immovable property" within the meaning of Section 2 (5) of the General Clauses Act, 1868, so as to found a suit for pre-emption in respect of a sale thereof under Section 9 of the Punjab Laws Act, 1872

11

" *Pre-emption—Mortgage by conditional sale—Failure by pre-emptors to tender amount due on mortgage after notice, effect of—Plaintiff in pre-emption suit acting banami—Joint suit for pre-emption by numerous occupancy tenants—Price to be paid by pre-emptors on foreclosure of mortgage—Punjab Laws Act, 1872, Sections 13, 14, 15.*

Held, that in the case of a foreclosure of mortgage by conditional sale, the failure on the part of the pre-emptor to tender the amount due on the mortgage after notice duly served upon him, does not involve forfeiture of his right of pre-emption, the provision as to forfeiture contained in Section 14 of the Punjab Laws Act, which deals with sales, having been intentionally omitted, in Section 15 of the Act, which deals with foreclosures.

Held, further, that, though when it is proved that a plaintiff in a pre-emption suit is acting banami the Court should refuse the nominal plaintiff a decree, a plaintiff in such a suit is not disentitled to a decree merely because, in order to raise funds for the maintenance of his suit, he has entered into an agreement with other persons as to what he will do with the land if he gets it, any subsequent transfer of such land by the plaintiff after he has obtained it giving rise to a fresh cause of action to the other pre-emptors.

In a joint suit for pre-emption by several occupancy tenants and others it was objected on appeal that (1) the occupancy tenants had joined strangers in the plaint, (2) that plaintiffs were not the whole body of the occupancy tenants, and (3) that as individual tenants they could not combine their claims in a single suit.

Held, that the said objections were unfounded. If the list of plaintiffs included any persons who were not occupancy tenants, the proper course was to take the objection at the first hearing and have their names struck out, which could be done without altering the plaint

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generally or affecting the right of the remaining plaintiffs to claim the whole property. Moreover, as it was not disputed that each occupancy tenant could sue separately for the whole property, or that the whole property would be divided equally among those tenants who succeeded in obtaining a decree, there was no reason why the plaintiffs could not sue jointly, even upon the assumption that they did not represent the whole body of the tenants.

As regards the price to be paid by the pre-emptor, *held*, that he was entitled to take the property on foreclosure on payment, not of what was due on the mortgage, but of the market value only.

The mere fact that a pre-emptor in his eagerness to get the land and to outbid others, had professed himself ready to pay a sum considerably more than the market value, *held*, not to amount to an estoppel, it being established that such statement did not lead defendant to confess judgment or to do any other act which he would not have done had the statement not been made

19

Pre-emption.—*Pre-emption, suit for—Sale or contract to sell—Construction of document—Transfer of Property Act, 1882, Section 54.*—According to the terms of a certain deed, which was stamped with a one-rupee stamp, the vendor undertook to satisfy plaintiff further as to the vendor's title, and to execute a deed of sale within three months, after which, if such deed was not executed, plaintiff might sue for specific performance. The amount of the purchase-money was Rs. 15,000, of which Rs. 4,300 was proved to have been paid in cash to the vendor.

Held, that the deed, rightly construed, amounted merely to a contract to sell and not a sale, and that the payment of consideration did not necessarily imply that the deed was a sale.

Held, further, that, under Section 54 of the Transfer of Property Act, 1882, which, though not in force in the Punjab, represents generally the law in force in British India, a contract for sale of immovable property does not of itself create any interest in, or charge upon, such property

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.. **Pre-emption—Sale to two co-sharers and a stranger—Subsequent acquisition of stranger's share by third co-sharer—Suit by a fourth co-sharer for pre-emption.**—The land in suit was in the first instance sold to three persons, of whom two were co-sharers in the joint holding, but one was not. Subsequently plaintiff, who was also a co-sharer in the said holding, sued for pre-emption in respect of the sale, but shortly before the institution of his suit, the stranger vendee sold his share to one K. C., another co-sharer in the same holding. Accordingly at the time when the suit was instituted, the land was in the hands of three vendees against no one of whom plaintiff could assert a superior right. It was, however, contended on behalf of plaintiff that regard must be had to the original transaction in which two vendees, who had equal rights with plaintiff, had joined with them in the purchase a third whose right was inferior to that of plaintiff, and that the right of pre-emption which plaintiff would in consequence have had as against the original vendees could not be defeated by the subsequent elimination of the stranger and the substitution of a person against whom plaintiff had not a superior right.

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Held, overruling the said contention, that the mere fact that at one stage a stranger had a share in the bargain could not be held to vitiate the right of the three persons who were the vendees at the date of suit and resisted plaintiff's claim with one that was not inferior to his own 69

Pre-emption.—Pre-emption—Claim in respect of land situate in out-growth of town of Batala and occupied by shops—Onus probandi.—Plaintiff sued for pre-emption of certain land which, though formerly agricultural, was at the date of suit situate in an out-growth of the town of Batala, and was occupied by business premises, or shops, and not by dwelling-houses.

Held, that the claim must be treated as one in respect of property which, though formerly agricultural land, should now be regarded as subject to urban rules.

Held, therefore, that the burden of proving that there was a custom of pre-emption applicable to such property was upon plaintiff, and *found*, that plaintiff had failed to relieve himself of such *onus*.

No. 87, *Punjab Record*, 1890, followed 70

" " *Pre-emption—Parties with equal rights of pre-emption—Liability of party who privately purchases from original vendor to be defeated by party who subsequently to such purchase sues original vendor and vendee for pre-emption.—A*, having sold certain property, in respect of which X and Y had equal rights of pre-emption, to B, X privately purchased the said property from B. Subsequently to such re-sale, Y sued A and B for pre-emption.

Held, that X by his purchase from B had asserted his pre-emptive title in so efficacious a form as to be entitled to have his bargain secured to him against every one not having a superior right of pre-emption.

No. 138, *Punjab Record*, 1884, and *I. L. R.*, XX[All., 100, followed... 73

" " *Pre-emption—Conditional decree—Payment of purchase-money—Appeal—Decree of Appellate Court confirming decree of first Court, but silent as to time for payment of purchase-money.—The first Court granted plaintiff a decree for possession of certain land on payment by him of Rs. 300 within one month from the date of decree. Plaintiff appealed to the lower Appellate Court on the question of price and costs. The lower Appellate Court dismissed the appeal and concluded its judgment as follows: "I observe that plaintiff admits not having paid Rs. 300 into Court as directed by the 16th April 1898. This should be taken into account by the lower Court in the event of plaintiff now desiring to pay in the money. I have not thought it right to extend in any way the time within which the plaintiff should have liberty to deposit his money." Forty-eight days after the date of the latter decree plaintiff filed an application for revision in the Chief Court, but did not deposit the said purchase-money or any part thereof.*

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Held, following *Rup Chand v. Shams-ul-Jahan* (I. L. B., XI All., 346), that inasmuch as the decree of the first Court had allowed one month for payment of the purchase-money, and the appeal against that decree had been dismissed without any fresh period for payment being expressly allowed, the Appellate decree must be taken to have incorporated the terms of the original decree, that the period of one month allowed for payment must be calculated from the date of the Appellate decree, and that payment by the decree-holder within one month of that date would have been in time.

Under the circumstances of the present case, the Chief Court granted the decree-holder a further period of 14 days from the date of its order for such payment 88

Pre-emption.—*Pre-emption, Act IV, of 1872, Section 12*—"Landowner" and "Landholder"—*Purchase of small plot of unculturable land.*—Plaintiff, one of the old proprietary body with a large holding, claimed possession by pre-emption of certain land which had been sold by one M. to defendants by registered deed of sale. Defendants admitted plaintiff's right to pre-empt, but pleaded that their rights of pre-emption were equal as they also owned land in the same *taraf* as the land in question. It appeared that defendants owned 1 *kanal* $1\frac{1}{2}$ *marlas* of land *ghair-mumkin chappar*, that is unculturable pond, which they purchased for Rs. 200. The point for decision was whether the possession of this plot of unculturable land constituted defendants vendees "landowners or landholders" within the meaning of Section 12 (d) of Act IV of 1872.

Held, that defendants were not "landowners" or "landholders" within the meaning of the said section so as to be entitled to a right of pre-emption equal to that of plaintiff.

No. 153, *Punjab Record*, 1888, followed; No. 7, *Punjab Record*, 1896, distinguished 96

" *Pre-emption—Death of claimant pendente lite—Abatement of suit—Muhammadan Law—Punjab Laws Act, 1872, Section 5.*—The plaintiff in a suit for pre-emption died *pendente lite*, whereupon his sons were brought on the record and obtained a decree. On appeal the Divisional Judge *proprio motu* dismissed the suit on the ground that by Muhammadan Law, which was the personal law of the parties, the death of a person who claimed pre-emption caused the abatement of the suit.

Held, that under Section 5 of the Punjab Laws Act, 1872, Muhammadan Law, even though the parties were Muhammadans, was inapplicable to a claim for pre-emption in respect of agricultural land, and that a suit for pre-emption brought by a landowner respecting village lands should not be regarded as a merely personal action which must terminate on the death of the original plaintiff, and does not survive to his representatives 98

Presumptions.—*Presumption as to dedication of road to public.*—See *Limitation Act 1877, Section 26.*

" *Presumption as to regularity of proceedings.*—See *Limitation Act, 1877, 2nd Schedule, Article 141, No. 1.*

The references are to the Nos. given to the cases in the "Record."

No.

Principal and Agent.—*Suit for recovery of money paid to agent for unlawful purpose—Suit instituted before execution of unlawful object—Principal and agent—Contract Act, 1872, Section 23—Locus penitentiae.*—Plaintiff sued on the allegations that he paid a sum of Rs. 300 to the defendant, a friend of his, to procure him a bride; that defendant had represented that this sum was to be paid to the bride's father in advance, and the betrothal performed on the 9th Nauratra; that no betrothal had taken place, and that defendant on being asked to refund had denied the receipt of the money. Defendant denied the transaction altogether. The first Court found that plaintiff's allegations were proved, and that he was entitled to recover, but the Divisional Judge on appeal held that the defendant had undertaken to act as a mere procurer, that the contract was opposed to morality and public policy, and following No. 116, *Punjab Record*, 1880, dismissed the suit without going into the facts. Plaintiff appealed to the Chief Court.

Held, that inasmuch as, upon the true construction of the transaction defendant was merely a go-between or agent of the plaintiff for paying the money to the bride's father, the property in the money did not pass to the defendant, but remained with the plaintiff so long as it continued in defendant's hands or until it was paid over to the father of the intended bride.

Held, therefore, that the suit was maintainable.

A person who pays money to his agent, whether on the agent's representation or of his own motion, for an unlawful purpose is entitled to a *locus penitentiae*, and can call back his money at any time before the purpose is executed, nor in such a case can the agent, merely because he was entrusted with an unlawful commission, repudiate his liability to refund and appropriate the money to his own use.

I. L. R., XXIII *Oalc.*, 962; *I. L. R.*, XVIII *Mad.*, 388; No 106, *Punjab Record*, 1879; No. 50, *Punjab Record*, 1880; No. 116, *Punjab Record*, 1880; No. 128, *Punjab Record*, 1889:—*Taylor v. Bowers* (*L. R. I.*, Q. B. D., 291) and *Kearley v. Thomson* (*L. R.*, XXIV, Q. B. D., 747), referred to

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Promissory Note.—*Consideration—Inequitable bargain—Burden of proof.*—In a suit by plaintiff to recover from defendant No. 1 and his wife a sum of Rs. 10,000 principal and Rs. 2,400 interest on a promissory note purporting to be executed by both defendants on the 29th November 1895, payable six months after date, defendant No 1 while admitting execution, pleaded that after he had attained majority his extravagance had necessitated his estate being again put under the Court of Wards; that after the time the debt was contracted he was living on a small monthly allowance of Rs. 160, which was inadequate for his wants; that he cast about for a loan, and that plaintiff, whom he described as an astute lawyer's clerk, caught him in his meshes and got him to execute the note for a grossly inadequate consideration. It was, therefore, urged on his behalf that the doctrine of the English Court of Chancery in the case of expectant heirs and necessitous persons should be applied, and a decree passed merely for what he had actually received, with reasonable interest thereon.

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It appeared that defendant No. 1 was a well grown and mature man of about thirty, who had already succeeded to a large estate, and that, though addicted to extravagance and debauchery, he was not a person of weak mental capacity, or in any state of mental or bodily distress, or such necessity as made him incapable of weighing the consequences of the transaction into which he was entering with the plaintiff with whom he had had no previous dealings.

Held, that under the above circumstances defendant No. 1 could not be placed in the category of those incapable of protecting themselves, and that the case must, therefore, be treated as an ordinary case of debtor and creditor, the *onus* of proof of all the disputed facts being, on the pleadings, upon defendant No. 1.

Held, further, that there is an equity founded upon the gross inadequacy of consideration, but it can only be when the inadequacy is such as to involve the conclusion that the party either did not understand what he was about or was the victim of some imposition.

Found, upon the evidence, that defendant No. 1 had failed to prove his allegations.

A plea by defendant No. 2 that she had never executed the promissory note or put her mark on it, or received consideration in respect thereof, *found*, not established

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Promissory Note.—Document, construction of—Promissory Note or acknowledgment of liability—Suit based on document stamped with anna-stamp—Admissibility of document in evidence—Right of plaintiff to fall back on original consideration—Evidence Act, 1872, Section 91—Stamp Act, 1879, Section 34.—Plaintiff in his plaint alleged that "on the 17th June 1897 defendant raised Rs. 500, cash, at Lahore, and wrote "the promissory note. He agreed to repay the money by monthly instalments of Rs. 100, and further agreed to pay Rs. 1 per cent. "per mensem as interest," that demand for payment had been made, and that the cause of action arose on the expiry of the period for the payment of each instalment, the suit being filed on the 14th October 1897 for three instalments and interest as above stated. The document referred to had affixed to it an anna-stamp, and was in the following terms:—"Received from Mr. E. G., Superintendent, Punjab Dairy, the sum of Rs. 500 only, as advance, repayable by instalments "of one hundred per month, and to bear interest at Rs. 12 per "cent.—17th June 1897." It was signed by the defendant.

The first Court dismissed the suit on the ground that the document upon which it was based was a promissory note, payable otherwise than on demand, and, being insufficiently stamped as such, could not, under Section 34 of the Stamp Act, 1879, be admitted in evidence for any purpose, even on payment of a penalty, in a civil suit. Plaintiff applied for revision of this order, and it was contended on his behalf that the document bore a dual character, as a promissory note and as an admission of liability, and was admissible in evidence as an acknowledgment. It was further contended that the Rs. 500 were made up of advances for milk made at various times, and that plaintiff was in any event entitled to fall back upon the original consideration of the contract,

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Held, that the document upon which plaintiff based his suit was a promissory note, payable otherwise than on demand, and being insufficiently stamped as such could not, under Section 34 of the Stamp Act, be received in evidence or acted upon in a civil suit.

Held, further, that plaintiff was not entitled to aver against his plaint or to amend his plaint in such a manner as to sue on the original consideration.

Held, also, that from the frame of the suit it was clear that the document sued on embodied the contract between plaintiff and defendant, and was the contract out of which defendant's liability arose, and that under Section 91 of the Evidence Act, the document was the best evidence of the contract, and no other evidence of the terms thereof could be given

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Proprietary body of village.—Right of proprietary body to contest alienation by widow of a childless proprietor.—See Custom II—Alienation, No. 4.

" " " Custom—Succession—Exclusion of collaterals by proprietors of village.—See Custom III—Inheritance, Nos. 6 and 8.

Public, Dedication of road to.—See Limitation Act, 1877, Section 26.

Punjab Courts Act, 1884.—Section 26.

See Section 75, *infra*.

" " " Section 40.—"Question of law involved"—Burden of proof.—See Burden of Proof, Nos. 5 and 6.

" " " Section 67—Punjab Courts Act, 1884, Section 67—Hearing fixed for gazetted holiday—Obligation of party to appear on such day.—Proceedings held in a Civil Court on a holiday are not necessarily a nullity on that account, but if the Court wishes to hear a case on a gazetted civil holiday, it must do so with the consent of the parties concerned, and cannot make them appear before itself without such consent, the exemption from attendance in Court on a gazetted holiday being a privilege conferred by law, of which no Court can of its own motion deprive the person concerned in the absence of any waiver of such privilege on the part of the latter. Nor in this respect is there any distinction between one class of gazetted holidays and another class

55

" " " Section 75.—Punjab Courts Act, 1884 Sections 26, 75—"Business" and "functions" of District Court—Power of District Judge to assign function of trying a case to Additional District Court—Case in excess of pecuniary limits of latter Court's jurisdiction.—Section 75 of the Punjab Courts Act must be construed in consonance with Section 26 of the Act, and it is therefore not competent to a District Judge by any act of his under sub-section (2) of Section 75 to extend the powers conferred on Judicial Officers by the Local Government under Section 26.

The "business in the Court of the District Judge" spoken of in Section 75 (1) of the Act means business it has to dispose of as the District Court, and the "functions" mentioned in sub-section (2)

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of the said section are functions proper to such Court, and must be such as a Sub-Judge of the highest class is unable to discharge, and do not mean the mere trial of civil suits of the value of over Rs. 5,000 46

Punjab Land Revenue Act, 1887.—Section 111.—See *Partition*, No. 3.

" " " Section 115.—See *Partition*, No. 3.

" " " Section 116.—See *Partition*, No. 3.

" " " Section 117.—See *Partition*, No. 1.

" " " Section 158.—See *Partition*, Nos. 2 and 3.

Punjab Laws Act, 1872.—Section 5.—See *Pre-emption*, No. 12.

" " Section 9.—See *Pre-emption*, No. 4.

" " Section 12.—See *Pre-emption*, No. 11.

" " Sections 13, 14, 15.—See *Pre-emption*, No. 5.

Punjab Municipal Act, 1891.—Section 2.—See Section 45, *infra*.

" " Section 45.—*Punjab Municipal Act, 1891*, Sections 2 (2), 45 (8) (c) —Tax leviable by the year.

Held, that in a Municipality governed by Act XX of 1891, a tax leviable by the year is, under Section 45 (8), proviso (c), leviable by the calendar year from the 1st January to the 31st December, and that the said proviso relates equally to taxes which were imposed before the said Act came into force, and which had hitherto been levied by the financial year from the 1st April to the 31st March ... 4

Sections 91, 92, 94, 95.—See *Municipal Committee*.

Punjab Tenancy Act, 1887.—Section 50.—See *Landlord and Tenant*, No. 3.

" " Section 53.—See *Occupancy Rights*, No. 3.

" " Section 56.—See *Occupancy Rights*, No. 3.

" " Section 58.—See *Landlord and Tenant*, No. 1.

" " Section 59.—See *Occupancy Rights*, Nos. 1 and 2.

" " Section 60.—See *Occupancy Rights*, No. 3.

" " Section 77.—See *Landlord and Tenant*, No. 3.

Q.

"*Question of Law.*"—See *Burden of Proof*, Nos. 5 and 6, *Easement*.

"*Question as to Title.*"—See *Partition*, Nos. 2, 3 and 4.

R.

Reciprocal Promises.—See *Contract Act, 1872*, Section 52.

Recovery of money paid to agent for unlawful purpose.—See *Principal and Agent*.

Registration Act, 1877.—Section 17.—Document, construction of—*Registration Act, 1877*, Sections 17, 49—*Partnership or co-ownership*—*Abandonment*—*Estoppel*—*Limitation Act, 1877*, 2nd Schedule, Articles 142, 144.—

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No.

Plaintiffs sued for an account of the income and expenditure of a certain *kul* (or water-course) jointly excavated by the parties under an agreement in writing, dated 24th February 1873, whereby it was agreed, *inter alia*, that in consideration of half the outlay in excavating the *kul*, which originally belonged to defendant and his ancestors, but had fallen into disrepair and become useless, the plaintiff was to become a half-sharer therein: that thenceforth the income and expenditure on the *kul* was to be shared in the same proportion, and that in the event of a sharer failing to pay the expenses of repairs, he was to be debarred from participating in the income of that year. Defendants admitted the agreement and rendition of accounts till 1936 *Sambat*, but alleged that after that year the *kul* was stopped, and litigation ensued with the owners of certain villages; that plaintiff refused to contribute towards the expenses and gave up his share; and that defendants had conducted the cases themselves and enjoyed the profits of the *kul* ever since. The District Judge dismissed the suit on the ground that plaintiff, by refusing to contribute towards the expenses of the said litigation and by his subsequent conduct had abandoned and lost his rights in the *kul*. This decree was upheld on appeal by the Divisional Judge, both on the ground that plaintiff had abandoned and lost his said rights, and also that his conduct estopped him from preferring the present claim.

Plaintiff having appealed to the Chief Court, the defendants supported the decree of the Lower Courts, not only on the ground of abandonment and estoppel, but also on the grounds (a) that plaintiff's rights in the *kul* could not be proved, as the written agreement of 1873 required registration, and being unregistered was inadmissible in evidence; (b) that the suit was practically one for accounts of a partnership, and therefore could not lie without a prayer for dissolution; and (c) that the failure of plaintiff to contribute towards the expenses of repairs debarred him from claiming a share of the produce for any of the years for which accounts were claimed.

Held, that the claim was one relating to profits of immovable property, and that the right, in respect of which the parties were litigating and which formed the basis of the claim, was one regarding such property, and that, therefore, the limitation for the possession of a share in the *kul* would be 12 years whether under Article 142 or Article 144 of the Limitation Act.

Found, upon the evidence, that there was no proof of abandonment on the part of plaintiff.

Held, further, that the written agreement of 1873 did not require registration inasmuch as, taken as a whole, it meant nothing more than that the defendant agreed to give plaintiff a half share in the *kul*, provided that the latter paid a half share of the expenses of excavation, and that such a condition did not create a present right in the *kul*, but merely one that would come into existence in the event of plaintiff fulfilling the said condition.

Held, also, that even if it were conceded that a present right was created by the instrument, it was only a right in the ruined *kul*, which had at the time no value at all, and certainly could not be said to have

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been worth Rs. 100, and that the valuable property which might come into existence if the conditions of the agreement were carried out could not be held to furnish the test of valuation.

Section 17 of the Registration Act must be strictly construed, and unless a document is clearly brought within the purview of the section, it cannot be excluded from evidence, and in case of doubt, the benefit must be given to the document.

Held, upon the facts of the case, that the claim was one for accounts of a co-ownership in immovable property, and not of a partnership.

Held, finally, that the agreement, rightly construed, only deprived a co-sharer of the income in case he refused to pay his quota of expenses of repairs, &c., and that mere non-payment did not amount to such refusal, though defendant was entitled to deduct the amount of the said expenses from plaintiff's share of the profits

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Registration Act, 1877.—Section 49.—See Section 17, supra.

" " " *Section 49.—Mortgage-deed relating to immovable property—Deed compulsorily registrable, but registered in wrong Registry Office—Admissibility of deed in evidence—Registration Act, 1877, Section 49—Fraud.*

Held, that the mere fact that a mortgage-deed, which is compulsorily registrable, has been registered in a wrong Registry Office, does not render such deed inadmissible in evidence as against a purchaser at execution sale of the land mortgaged, who, not knowing that such land was subject to mortgage, does not plead that he was misled by the deed not being registered at the proper office, or that he was induced to purchase because, on inquiry, at the latter office, he learnt that there was no outstanding incumbrance.

A plea that the said mortgage was in fraud of creditors, *held*, not established

44

" " " *Section 50.—Lis pendens—Registered and unregistered deeds—Registration Act, 1877, Section 50—Section 50 of the Registration Act, 1877, gives priority to registered documents of certain specified classes, as regards property comprised therein, over unregistered documents relating to the same property, not being decrees or orders, provided, in the latter case, that such decrees or orders are prior in point of date to the registered document.*

Where, however, an unregistered mortgagee had already brought his suit to enforce his mortgage, *held*, that a mortgage, by registered deed, of the same property made during the litigation must, in accordance with the principles of *lis pendens*, be treated as subject to the result of the suit

32

Regularity of proceedings—Presumption as to—See Limitation Act, 1877, 2nd Schedule, Article 141.

Regulation, XVII of 1806.—See Limitation Act, 1877, 2nd Schedule, Article 141.

" " " *See Mortgage, No. 6.*

Removal of Guardian.—See Guardian and Wards Act, 1890, No. 1.

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No.

Res-judicata.—See *Civil Procedure Code*, Section 13.

" " See *Custom III—Inheritance*, No. 8.

" " See *Limitation Act*, 1877, 2nd Schedule, Article 141.

" " **Res-judicata—Omission by guardian ad litem of minor to appeal against decree—Gross negligence on part of guardian—Effect of such decree.**
—Where in a previous suit a decree was passed against the present plaintiff, who at the time was a minor, and was duly represented by his mother as his guardian *ad litem*, held, that the omission by the latter to appeal on his behalf from such decree, notwithstanding that there were excellent grounds, both in law and on the facts, for an appeal, amounted to gross negligence on her part, and that under such circumstances it would be contrary to law and equity to hold the plaintiff bound by the former decree.

The position of a guardian *ad litem* of a minor being that of a trustee, he is bound strictly to act in the interests of the minor, and he has not the liberty, as long as he retains his position, of abandoning the case as he would have were it his own, unless such abandonment is clearly in the interests of the minor. Every case must be judged by its own facts, and for the purpose of finding out whether such guardian was guilty of laches or fraud in previous proceedings, the Court has power to go into them and to form its own conclusions regarding them

35

Reversioners.—*Joint suit by reversioners against person in unlawful possession—Misjoinder of causes of action.*—See *Cause of Action*.

" **Custom—Succession to childless proprietor—Exclusion of near collateral by proprietors of village—Village founded within boundaries of old village—Right of collaterals residing in latter to succeed to land in former—Succession of adopted son in his natural family—Riwaji-am.**—See *Custom III—Inheritance*, No. 6.

" **Custom—Succession—Suit between co-proprietors of village in which the land was situate and deceased's near agnates residing in another village—Finding in a previous suit that one of the co-proprietors was deceased's collateral, effect of—Res-judicata—Dhillon Jats of Narain-garh, Amritsar District.**—See *Custom III—Inheritance*, No. 8.

" **Mortgage by widow—Decree of foreclosure against widow—Suit by reversioners for recovery of land after death of widow.**—See *Limitation Act*, 1877, 2nd Schedule, Article 141.

" **Speculative suit by reversioners for declaratory decrees.**—See *Specific Relief Act*, 1877, Section 42.

Reversioners—Locus standi of.—See *Cause of Action*.

" See *Custom II—Alienation*, Nos. 3, 4, 6 and 8:

" See *Occupancy Rights*, Nos. 2 and 3.

Review of judgment.—See *Civil Procedure Code*, 1882, Section 623,

Revision in civil cases.—*Civil Procedure Code*, 1882, Section 622—*Power of Chief Court in revision to dispose of case on merits.*—See *Burden of Proof*, No. 5.

" " " **"Material irregularity"—Contradictory finding by lower Appellate Court.**—See *Burden of Proof*, No. 6.

The references are to the Nos. given to the cases in the "Record."

- Revision in civil cases.—Application for revision—Other remedy open to applicant.—
See *Civil Procedure Code*, 1882, Section 520.
- " " " " *Small Cause Court Act*, 1887, Section 25—Second application for revision after rejection of first application.—See *Civil Procedure Code*, 1882, Section 623.
- " " " " *Guardian and Wards Act*, 1890, Sections 12 (3) (b), 47—Preliminary order as to custody of property—Revision.—See *Guardian and Wards Act*, 1890, No. 2.
- " " " " *Provincial Small Cause Court Act*, 1887, Section 25—Revision—Wagering transaction—Written contract—Admissibility of evidence to prove that contract was void under Section 30 of the *Contract Act*—*Evidence Act*, 1872, Section 92.
- The Judge of the Small Cause Court dismissed plaintiffs' suit on the ground that the evidence proved that the written agreement sued upon, which purported to be one for sale of silver, was not a *bond fide* transaction, no actual interchange of silver being contemplated, but merely an adjustment of profit and loss with reference to a difference in the market rates. Plaintiffs applied to the Chief Court for revision of the order of dismissal on the ground, (1) that there was no evidence to show that delivery of silver was not intended, and (2) that oral evidence was inadmissible to contradict the terms of the written agreement according to which silver was to be delivered.
- Held, that as there was evidence on which the Judge of the Small Cause Court might base his finding that the transaction was a wager, that finding should not be disturbed on revision.
- Held, further, that the oral evidence was admissible, under the first proviso to Section 92 of the *Evidence Act*, for the purpose of invalidating the written agreement.
- I. L. R.*, XVII Mad., 480, and *I. L. R.*, XII Bom., 585, followed; *I. L. R.*, IX Cal., 791, not followed 85
- Right of way.—Easement—Public or private road—User of road by public for less than 20 years—Presumption as to dedication—*Limitation Act*, 1877, Section 26.—See *Easement*.
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- " See *Occupancy Rights*, Nos. 2 and 3.
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- Sale.—Suit for possession on ground that a certain sale was invalid as against plaintiff—Plea by defendant that plaintiffs acquiesced in sale—"Acquiescence"—*Estoppel*.—See *Acquiescence*.
- " Res-judicata—House and land sold by one deed of sale—Suit in respect of house—Subsequent suit in respect of land—Finding in first suit that deed of sale was void, effect of, as regards subsequent suit—See *Civil Procedure Code*, 1882, Section 13.

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Sale.—Sale of share of residential house by one of four Hindu co-sharers—House occupied by tenant—Right of vendee to joint physical possession—Civil Procedure Code, 1882, Section 263.—See Civil Procedure Code, 1882, Section 263.

" **Pre-emption**—Fraudulent concealment of sale—Limitation Act, 1877, Section 18, knowledge of facts, presumption as to.—See Limitation Act, 1877, Section 18.

" **Suit to contest validity of sale**—Right of plaintiffs to attack mortgage made in favour of vendee more than 12 years before suit—Merger of mortgage in sale—Limitation Act, 1877.—See Mortgage, No. 7.

" **Pre-emption**—Sale or contract to sell—Construction of document—Transfer of Property Act, 1882, Section 54.—See Pre-emption, No. 6.

Security.—Failure of guardian to furnish.—See Guardian and Wards Act, 1890, No. 1.

Separation—Deed of—See Husband and Wife, No. 1.

Set-off.—Partnership—Lien—Contract Act, 1872, Sections 60, 61, 217, 262—Civil Procedure Code, 1882, Section 111.—See Partnership, No. 2.

Small Cause Court—Jurisdiction of—See Small Cause Court Act, 1887, 2nd Schedule, Article 13.

Small Cause Court Act, 1887—Section 25.—See Civil Procedure Code, 1882, Section 623.—Revision in Civil Cases, No. 6.

" " " " " **Second Schedule, Article 13.**—Jurisdiction of Small Cause Court—Suit by lessee of Government ferry for recovery of tolls—Small Cause Court Act, 1887, 2nd Schedule, Article 13.

Held, that a ferry, such as that at Khushalgarh, must be regarded as immovable property vested in the Local Government, and that a plaintiff, when claiming as lessee of the ferry to recover tolls or dues, claims to recover by reason of an interest in immovable property transferred to him by Government.

Held, therefore, that such a suit is excluded from the cognizance of a Small Cause Court by Article 13 of the 2nd Schedule to the Small Cause Court Act, 1887

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Specific Relief Act, 1877—Section 42—Declaratory decree, suit for, by reversioner—Speculative suit—Specific Relief Act, 1877, Section 42.—Plaintiff sued for a declaration that, after the death of Mussammatt J., who was at the time in possession of the property, with a widow's interest, they were entitled to succeed to it. Their suit was dismissed by the Divisional Judge on the ground that the widow had not done any act or made any alienation of the property which might raise an apprehension of injury to plaintiffs' right, there being no allegation that any denial of their rights was made before the institution of the suit.

Held, that the suit had been rightly dismissed 42

Speculative suit for declaratory decree.—See Specific Relief Act, 1877, Section 42.

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Stamp Act, 1879—Section 34.—Document, construction of—Promissory Note, or acknowledgment of liability—Suit based on document stamped with anna-stamp—Admissibility of document in evidence—Right of plaintiff to fall back on original consideration—Evidence Act, 1872, Section 91—Stamp Act, 1879, Section 34.—See Promissory Note, No. 2.

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“ “ Custom—Succession to childless proprietor—Exclusion of near collaterals by proprietors of village—Village founded within boundaries of old village—Right of collaterals residing in latter to succeed to land in former—Succession of adopted son in his natural family—Riwaj-i-am.—See Custom III—Inheritance, No. 6.

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“ Custom—Alienation—Gift by widow in favour of daughter married after death of widow's husband—Khanadamadi—Gujarat of Gujarat—Riwaj-i-am.—See Custom II—Alienation, No. 5.

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" *Limitation Act, 1877, Articles 141, 142—Adverse possession—Suit by reversioners on death of widow.—See Limitation Act, 1877, 2nd Schedule, Article 141, No. 2.*

" *Occupancy Right.—Alienation by widow in favour of proprietor—Right of reversioner to object—Punjab Tenancy Act, 1877, Section 59 (3).—See Occupancy Right, No. 2.*

" *Partition—Right of widow who has succeeded to her husband's interests in joint holding to claim partition—Grant of such prayer by Revenue Officer—Jurisdiction of Civil Court to entertain subsequent suit by co-sharers objecting that widow is by custom not entitled to claim partition—"Question as to title"—"Owner" and "Landowner"—Punjab Land Revenue Act, 1887, Sections 111, 115, 116, 158.—See Partition, No. 3.*

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" *Limitation Act, 1877, 2nd Schedule, Article 93—Suit for declaration that an alleged will was a forgery, and that testator had no power to make such will—Custom—Succession of daughter.—See Custom III—Inheritance, No. 2.*

" *Will, construction of—Principles of construction—Bequest to Hindu widow as malik—Presumption as to nature of bequest to Hindu female.*

Although in construing a will, the Court should endeavour to gather the intention of the testator from the words actually employed by him, it is quite legitimate (subject to the express terms of the will) in construing the will of a Hindu with reference to a bequest in favour of a female to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property. Ordinarily, their ideas are repugnant to giving a female a power of alienation over immovable property, especially if it is ancestral, and it may, therefore, be properly presumed, in the absence of clear indications to the contrary, that a devise of such property to a Hindu female does not confer an estate of inheritance, but only a life estate or a widow's estate as understood by Hindu Law. Nor is it a necessary result from the use of the term *malik* in respect of a Hindu female to whom a bequest is made, that she should be considered the absolute owner of the property so bequeathed to her.

Applying the above principles of construction to the terms of the will in the present case, the Court held that, as the words used by the testator on the whole admitted of the interpretation that it was intended to give merely a life estate or a widow's estate to the female devisee, such interpretation should have preference

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Guardians and Wards Act, 1890, Sections 3, 7—"Will or other instrument"—*Nuncupative will—Appointment of minor's heir as guardian of property.*

The references are to the Nos. given to the cases in the "Record."

Held, that the provisions of Section 7 of the Guardians and Wards Act, 1890, do not apply to nuncupative wills.

Held, further, that inasmuch as a minor's heir is peculiarly interested in the good management of the property to which he hopes to succeed, there is no objection to the appointment of such a person as guardian of the minor's property as distinct from the minor's person . 54

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—See *Criminal Procedure Code*, 1882, *Section* 339.

"Accused person."—See *Criminal Procedure Code*, 1882, *Section* 339.

Accused—*Witnesses called by.*—*Practice*—*Refusal of District Magistrate to summon witnesses for defence without expenses being paid by accused.*—An order by a District Magistrate refusing to summon witnesses for the defence without their expenses being paid by the accused, although legal, should be passed very sparingly, and is an improper order in a case where the accused is unable or unwilling to deposit the money, and the result is that he is convicted without his witnesses being heard, especially if the case is one in which a severe sentence is inflicted ...

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Acquittal—*Appeal by Government from.*—See *Appeal in Criminal Cases*, No. 3.

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Act XX of 1891.—See *Punjab Municipal Act*, 1891.

Act XII of 1896.—See *Excise Act*, 1896.

Act V of 1898.—See *Criminal Procedure Code*, 1898.

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Appeal in Criminal Cases.—*Criminal Procedure Code*, 1882, *Sections* 30, 35, 337, 380—*Omission by District Magistrate to submit sentences passed by him for confirmation by Sessions Judge*—*Appeal by accused to Sessions Judge*—*Procedure*—*District Magistrate at whose instance pardon was tendered to*

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approvers trying case himself—Penal Code, Section 395.—The District Magistrate of Gurgaon, with enhanced powers under Section 30 of the Criminal Procedure Code, charged certain persons with three separate offences of dacoity, and tried them for the same at one trial. He convicted four of the accused, and passed on them aggregate sentences of 5, 7, 7 and 5 years, respectively, but overlooked the fact that, under Section 35 of the Code, such sentences were single sentences requiring confirmation of the Sessions Judges, and did not submit them for confirmation. The accused appealed to the Sessions Judge, who submitted the files to the Chief Court, with a recommendation that the convictions should be quashed on the revision side, and the District Magistrate directed to commit the accused to the Sessions. The principal ground for the recommendation was that the District Magistrate, having tendered a pardon to two approvers, and having examined them, was, by the last paragraph of Section 337 of the Code, incapacitated from trying the case himself. It appeared that the pardons were tendered to the approvers by a Magistrate of the 1st class at the instance, or with the sanction, of the District Magistrate, and that the approvers were examined by the former Magistrate, and were subsequently examined by the District Magistrate in the course of the trial.

Held, that the omission by the District Magistrate to duly submit the sentences for confirmation could not operate to change the course of appeal, and that the Sessions Judge on having the cases brought to his notice through the medium of an appeal, should have proceeded to exercise his confirmatory jurisdiction under Section 380 of the Code whereupon the appeals would have lain to the Chief Court under Section 408.

Held, further, that the provisions of Section 337 of the Code must be construed strictly, and that the disqualification created by the last paragraph applies only to that Magistrate before whom the suspected person is brought face to face, and who attempts to induce him by promise of pardon to make a full and true disclosure, the examination referred to in the said paragraph being the one made on the tender of the pardon and directly resulting from it, and not the examination of the approvers in the course of the trial ... 3

Appeal in Criminal Cases.—Criminal appeal—Duty of Appellate Court to consider facts of case—Doubts entertained by Appellate Court.—Though in criminal cases an Appellate Court should be guided in its estimate of the evidence of a witness by remarks recorded by the first Court, under Section 363, Criminal Procedure Code, as to the demeanour of that witness, such Appellate Court is bound to independently consider the facts of the case, and the prisoner is entitled to the benefit of reasonable doubt in the appellate no less than in the first Court.

Where, therefore, the Sessions Judge admitted that he was "perplexed by the difficulties and incongruities of the case," but upheld the conviction on the ground that an Appellate Court should not interfere with the finding of the first Court unless clearly convinced that it was erroneous, *held*, that the judgment of the Sessions Judge must be set aside, and the appeal heard *de novo*.

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<i>Appeal in Criminal Cases.—Appeal by Government from order of acquittal—Appeals in petty cases.</i>	
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<i>Confirmation of Sentence.—See Appeal in Criminal Cases.</i>	
<i>Confiscation of property.—Gambling Act, 1867, Sections 8, 11—Confiscation of property belonging to person acquitted on trial.—The words "on conviction" in Section 8 of the Gambling Act, 1867, are intended to confer jurisdiction to order forfeiture only in cases where there is a conviction, and clearly mean that it cannot be exercised where there is no conviction. Nor, even where there is a conviction, is the power to order forfeiture unlimited, such power being necessarily restricted to property belonging to convicted persons, and not extending to property belonging to persons sent up for trial but acquitted under Section 11 of the Act</i>	5
" " " <i>Excise Act, 1896, Section 51—Animals and conveyance liable to confiscation.—Accused was found with 1½ seer of country liquor in his possession. He was carrying it in two bottles in his waistcoat pockets, and was riding on a mare at the time. He was convicted under Section 51 of the Excise Act, 1896, and sentenced to a fine of Rs. 20, and the mare on which he was riding was confiscated.</i>	
<i>Held</i> , that the order confiscating the mare, even if legal, was harsh and unnecessary, and must be set aside:	
<i>Semle</i> : Animals and conveyances liable to confiscation under the Act are those on which illicit liquor is loaded, and an animal on which a man is merely riding with such liquor in his pockets does not come under that description	10
<i>Criminal Courts—Subordination of.—Criminal Procedure Code, 1898, Section 195 (7)—Sanction for prosecution.—For the purposes of Section 195, Criminal Procedure Code, 1898, the Court of the District Judge is the Court to which a Munsif is subordinate, and it is the Court of the District Judge and not of the Divisional Judge which can give sanction for prosecution in respect of offences referred to in the said section when committed in the Court of a Munsif</i>	16
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" " " <i>Section 35.—See Appeal in Criminal Cases, No. 1.</i>	
" " " <i>Section 110.—Criminal Procedure Code, 1882. Section 110—Security for good behaviour—General reputation.—For a man to have a bad general reputation it is not necessary that there should be no one to give him a good character, but it is necessary that the evidence should be so strong as to leave no doubt what a man's general</i>	

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repute is. When, therefore, as good witnesses come forward to state that a man's reputation is good as those who states the contrary, it cannot be said that his reputation is bad, unless there is something to corroborate the witnesses against him,—No. 2, *Punjab Record*, 1897, Criminal, explained 2

*Criminal Procedure Code, 1882.—Section 110—Security for good behaviour—General repute—Evidence—Personal knowledge of Magistrate.—*Accused, who was a lambardar of Kalian, in the Chiniot *tahsil*, was ordered by the Magistrate to execute a bond for Rs. 1,000, with two sureties, for his good behaviour for a period of three years. It appeared that twenty-one persons gave evidence to the effect that accused was a habitual receiver of stolen property, while thirty-eight persons testified that he was by general repute a man of unblemished character. The order of the Magistrate was confirmed on appeal by the District Magistrate, who concluded his judgment by stating that he personally knew the accused to be a well-known receiver of stolen property, knowing it to be stolen. The accused applied to the Chief Court on the revision side.

Held, that the burden of proving an accused's bad character lies on the prosecution, and that, therefore, when the evidence on both sides is, as the Court found to be in the present case, of an indifferent and interested character, the prosecution must fail.

Evidence, as a rule, should be tested by its quality rather than by its quantity.

Held, further, that the case should have been decided solely on evidence taken in Court, and that the District Magistrate was not entitled to rely on his own personal knowledge.

The law regarding security for good behaviour is a hard law which can easily be used as an instrument of oppression, and should not, therefore, be enforced except on the best possible grounds. It is incumbent on Magistrates in such cases to exercise the greatest caution and impartiality, and to be careful not to be influenced by outside gossip and vague rumour 4

" *No. 1.*"—*Section 337.—See Appeal in Criminal Cases,*

" *Sections 337, 339, 436, 537—Tender of pardon to accomplices—Sessions Judge withdrawing pardon and committing accomplices for trial—Authority of Magistrate to tender pardon.—*Two women were suspected of the murder of one K. S., and it appeared from the record that a Magistrate of the 1st class tendered a pardon (which was accepted) to one of them, Mussammat T., before the case was *chalanad* to him by the Police, and committed the other, Mussammat D., to the Sessions Court for trial on a charge of murder. Mussammat T. gave evidence as a witness against Mussammat D., both before the committing Magistrate and in the Court of Sessions. The Sessions Judge, in acquitting Mussammat D., directed the withdrawal of Mussammat T.'s pardon, which he also found to

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have been given without proper authority and her commitment for trial on a charge of murder. Mussammat T. applied to the Chief Court to set this order aside.

Held, that the order of the Sessions Judge must be regarded as one under Section 436 of the Criminal Procedure Code, for although there had as yet been no formal discharge of Mussammat T., yet as she had been ordered to be placed on bail by the Magistrate as required by Section 337 of the Code, she must be regarded as an accused person till the close of the trial of Mussammat D., when there would necessarily be either a formal order for her discharge or for her commitment for trial, and it was then competent for the Sessions Judge, if he thought proper to direct, under Section 436, her commitment without waiting for a Magistrate to formally, and in the opinion of the Sessions Judge improperly, discharge her.

Section 339, Criminal Procedure Code, makes no provision for the mode in which a pardon is to be withdrawn, and the Magistrate or Court who could have placed the person accepting the pardon on his trial in the first instance, is competent to do so notwithstanding the pardon, if such Magistrate or Court considers that the conditions of the pardon have not been fulfilled. When the person holding the pardon is placed on his trial, he will first plead his pardon, and if he proves that it was in fact granted, he will be entitled to an acquittal unless the prosecution proves that (1) the accused has wilfully concealed material facts, or (2) has given false evidence.

When a pardon has been tendered and accepted in good faith, the fact that the Magistrate had no power to tender such pardon is a defect expressly cured by Section 537 of the Code 1

Criminal Procedure Code, 1882.—Section 380.—See Appeal in Criminal Cases, No. 1.

" " " Section 436.—See Section 339, *supra*.

" " " Section 537.—See Section 339, *supra*.

Criminal Procedure Code, 1898.—Section 5—Act XIII of 1859—Criminal Procedure Code, 1898, Sections 5, 83—Execution of warrants issued under Act XIII of 1859.—There is nothing in Section 5, read with Section 83 of the Criminal Procedure Code, 1898, which excludes from the operation of the latter section warrants issued under Act XIII of 1859.

Held, therefore, that a Magistrate has no discretion to decline to execute warrants issued by a Magistrate of another district under Section 1 of Act XIII of 1859, and forwarded to him for execution under Section 83 of the Criminal Procedure Code against persons resident in his district 11

" ' " " Section 83.—See Section 5, *supra*.

" " " Sections 190, 191.—*Criminal Procedure Code, 1898, Sections 190 (1) (c), 191, 534—Omission to comply with requirements of Section 191 of the Code.—The Magistrate having taken cognizance of an offence under clause (c) of sub-section (1) of Section 190 of the Criminal Procedure Code, 1898, proceeded to try the*

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case himself, and before commencing to record evidence omitted to inform the accused that he was entitled to have the case tried by another Court as prescribed by Section 191 of the Code. The accused having been convicted appealed to the Sessions Judge, and made it one of the grounds of his appeal that the omission to comply with the term of Section 191, invalidated the trial. The Sessions Judge, however, overruled this contention, relying on the analogy of Section 534 of the Code.

Held, that inasmuch as the Magistrate had interested himself very considerably in instituting the prosecution, and as his mind could not under the circumstances have been completely free from bias, it was incumbent on him to comply with the terms of Section 191, and to afford the accused an opportunity of making his election.

The Court accordingly set aside the conviction and ordered a new trial before another Magistrate

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Criminal Procedure Code, 1898, Section 195.—Sanction for prosecution—Subordination of Courts.—See Criminal Courts, Subordination of—

" " " Section 534.—See Sections 190, 191, *supra*.

" " " Section 545—*Criminal Procedure Code, 1898, Section 545—Culpable homicide—Power of Court to grant compensation—Act XIII of 1855—"Injury"—Penal Code, Section 44—Enhancement of sentence.*

Held, by the Full Bench, that it is competent to a Court, under Section 545 of the Criminal Procedure Code, 1898, to award part of the fine imposed under Section 304 of the Penal Code for the offence of culpable homicide not amounting to murder to the widow of the person killed, in compensation for the injury caused by the offence committed, the loss of her husband's support affecting a widow prejudicially in a legal right, and being therefore "an injury" as defined in Section 44 of the Penal Code, for which substantial compensation can be awarded by a Civil Court (*I. L. R., XII Mad., 352, and I. L. R., XXI Mad., 74 (F. B.), not followed*).

Where the accused, enraged by vile abuse addressed to him by deceased, struck the latter a severe blow on the head with the first thing that came to hand, *viz.*, a wooden lamp-stand, which blow fractured the skull and caused death not long afterwards, *held*, by the Division Bench that a sentence of two years' rigorous imprisonment, including two months' solitary confinement and a fine of Rs. 100, or, in default, six months' further rigorous imprisonment, passed by the District Magistrate was, under the circumstances of the case, not inadequate, and should not be enhanced.

Per Chatterji, J. (in Chambers).—An enhancement of sentence should take place only when the sentence awarded is manifestly inadequate, and the powers of the Chief Court for such purpose should be exercised only under exceptional circumstances

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Criminal trial.—Practice—Refusal of District Magistrate to summon witnesses for defence without expenses being paid by accused.—An order by a District Magistrate refusing to summon witnesses for the defence without their expenses being paid by the accused, although legal, should be passed

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very sparingly, and is an improper order in a case where the accused is unable or unwilling to deposit the money, and the result is that he is convicted without his witnesses being heard, specially if the case is one in which a severe sentence is inflicted 7

Criminal trial.—Hearing fixed for specified date, but subsequently accelerated—Accused's pleader unable to attend at hearing on altered date.—On the 16th May the trial of accused was fixed for the 26th May and petitioners' chief pleader was informed of the latter date, but on the 17th the date of hearing was changed to the 18th. The said pleader was informed of the change by telegram, and in reply telegraphed to the effect that he could not appear on the 18th, and asked to have the hearing fixed for the 23rd. Contrary, however, to this request and the wishes of the accused's other pleaders, the trial was proceeded with on the 18th, and continued till the 21st, when the case was decided and accused convicted.

Held, that the procedure of the Magistrate was improper, and gave accused just cause for complaint. If there were any reasons for accelerating the date of hearing, the trial should not have been concluded and judgment pronounced without waiting until the date desired by accused's pleader or the date originally fixed, hearing the pleader and allowing him to recall any of the witnesses he wished.

The Chief Court, however, refused to order a re-trial of accused on the ground that the irregularity and impropriety of the procedure had not, under the circumstances of this case, occasioned any failure of justice 14

D.

Date fixed for Criminal trial, alteration of.—See *Criminal trial*, No. 2.

Disqualification of Magistrate.—*Criminal Procedure Code*, 1882, Sections 30, 35, 337, 380—*Omission by District Magistrate to submit sentences passed by him for confirmation by Sessions Judge—Appeal by accused to Sessions Judge—Procedure—District Magistrate at whose instance pardon was tendered to approvers trying case himself*—*Penal Code*, Section 395.—See *Appeal in Criminal Cases*, No. 1.

E.

Enhancement of Sentence.—See *Criminal Procedure Code*, 1898, Section 545.

Evidence as to character.—See *Criminal Procedure Code*, 1882, Section 110, No. 2.

Evidence—False.—See *Sanction for prosecution*.

Excise Act, 1896.—Section 51.—*Excise Act*, 1896, Section 51.—*Animals and conveyances liable to confiscation.*—Accused was found with 1½ seer of country liquor in his possession. He was carrying it in two bottles in his waistcoat pockets, and was riding on a mare at the time. He was convicted under Section 51 of the Excise Act, 1896, and sentenced to a fine of Rs. 20, and the mare on which he was riding was confiscated.

Held, that the order confiscating the mare, even if legal, was harsh and unnecessary, and must be set aside.

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Semble : Animals and conveyances liable to confiscation under the Act are those on which illicit liquor is loaded, and an animal on which a man is merely riding with such liquor in his pockets does not come under that description 10

F.

False Evidence.—See *Sanction for prosecution.*—

G.

Gambling Act, 1867.—*Gambling Act, 1867, Sections 8, 11—Confiscation of property belonging to person acquitted on trial.*—The words "on conviction" in Section 8 of the *Gambling Act, 1867*, are intended to confer jurisdiction to order forfeiture only in cases where there is a conviction, and clearly mean that it cannot be exercised where there is no conviction. Nor, even where there is a conviction, is the power to order forfeiture unlimited, such power being necessarily restricted to property belonging to convicted persons, and not extending to property belonging to persons sent up for trial, but acquitted under Section 11 of the Act 5

"General Reputation."—See *Criminal Procedure Code, 1882, Section 110.*

Good behaviour—Security for.—See *Criminal Procedure Code, 1882, Section 110.*

Goods clerk—Public Servant.—See *Penal Code, Section 161.*

Government—Appeal by, from order of acquittal.—See *Appeal, Criminal Cases, No. 3.*

M.

Magistrate.—*Criminal Procedure Code, 1882, Sections 30, 35, 337, 380—Omission by District Magistrate to submit sentences passed by him for confirmation by Sessions Judge—Appeal by accused to Sessions Judge—Procedure—District Magistrate at whose instance pardon was tendered to approvers trying case himself—Penal Code, Section 395.*—See *Appeal in Criminal Cases, No. 1.*

" *Criminal Procedure Code, 1882, Section 110—Security for good behaviour—General repute—Evidence—Personal knowledge of Magistrate.*—See *Criminal Procedure Code, 1882, Section 110.*

O.

Oaths Act, 1873.—See *Sanction for Prosecution, No. 3.*

P.

Pardon.—*Criminal Procedure Code, 1882, Sections 30, 35, 337, 380—Omission by District Magistrate to submit sentences passed by him for confirmation by Sessions Judge—Appeal by accused to Sessions Judge—Procedure—District Magistrate at whose instance pardon was tendered to approvers trying case himself—Penal Code, Section 395.*—See *Appeal in Criminal Cases, No. 1.*

" *Criminal Procedure Code, 1882, Sections 337, 339, 436, 537.—Tender of pardon to accomplices—Sessions Judge withdrawing pardon and committing accomplices for trial—Authority of Magistrate to tender pardon.*—See *Criminal Procedure Code, 1882, Section 339.*

The references are to the Nos. given to the cases in the "Record."

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Penal Code—Section 44.—Criminal Procedure Code, 1898, Section 545—Oculpable homicide—Power of Court to grant compensation—Act XIII of 1855—"Injury."—See *Criminal Procedure Code, 1898, Section 545.*

„ „ Section 161.—“Public servant”—*Railway Act, 1890, Sections 3, 137*—*Railway servant at time of offence temporarily employed in service other than that of a Railway—Goods clerk.—A goods clerk employed by a Railway Administration is a Railway servant within the meaning of Section 3 (7) of the Railways Act, 1890, and under Section 137 of the said Act, is also a public servant for the purposes of Chapter IX of the Indian Penal Code.*

Railway servants proper as long as they do not cease to be such continue to be “public servants” for the purposes of Chapter IX of the Indian Penal Code, whatever functions they may be temporarily discharging at the time when the offence by, or in respect of, them is committed.

A goods clerk in the employment of a Railway Administration suspected certain frauds in the goods office, and made a report to that effect to his superiors. The matter was subsequently taken up by the Police, and brought to the cognizance of the District Magistrate, who referred it to the Police for inquiry. The goods clerk had meanwhile been deputed to assist the Police in the discovery and prosecution of the culprits, and while on such duty was approached by the accused, who offered him Rs. 500 if he closed the inquiry, and returned the books unchecked. The goods clerk, who was throughout in communication with the Police, contrived to have the conversation overheard by witnesses, and asked the accused to bring the money. They did so, and were arrested by the Police in the act of handing it over to the clerk. The District Magistrate convicted the accused under the second clause of Section 161 of the Penal Code, but they were acquitted on appeal by the Sessions Judge, on the ground that at the time of the offence the clerk was employed to assist the Police in the inquiry, and was not, therefore, at that time a Railway servant, as defined in Section 3 (7) of the Railways Act, 1890, and consequently, not a “public servant” for the purposes of Chapter IX of the Penal Code. On appeal by Government against the order of acquittal,

Held, that inasmuch as the goods clerk had not at the time of the offence any official functions in the discharge of which he could have shown the favour in consideration of which the bribe was offered, the offence was not covered by the second clause of Section 161, Penal Code.

But, *held*, that the offence fell under the third clause of Section 161.

The accused thought that the clerk alone possessed the technical knowledge necessary to bring home the suspected fraud to them from the records of the goods office, and that if he represented to the Police that there was nothing disclosed in the accused's books, on comparison with the Railway records, to prove anything against them, he would probably succeed in persuading the Police Inspector in charge of inquiry, who was a public servant, acting as such, to make a report to that effect to the District Magistrate, and to get the case dismissed and the books returned

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Penal Code—Section 193.—Sanction for prosecution—Penal Code, Section 193—False evidence—Inquiry under Act XXXVII of 1850—Repeal of Section 17 of Act XXXVII of 1850, effect of—Oaths Act, 1873, Sections 4, 14—Validity of sanction.—See Sanction for Prosecution, No. 3.

„ „ *Section 194.—Penal Code, Section 194—Sanction for prosecution.—Where an application is made for sanction for prosecution for an offence punishable under Section 194 of the Penal Code, either the application or the sanction should indicate to the person to be prosecuted what story or statement is alleged to be false*

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„ „ *Sections 451, 456.—Penal Code, Sections 451, 456, 509—Intention to commit offence—Rescue from illegal arrest.—In a case where it was proved that the accused was found at night inside complainant's house, where he had gone for the purpose of visiting the latter's widowed daughter-in-law, a woman of loose character, with whose knowledge and consent he had in all probability entered the room.*

Held, by the Chief Court, on the revision side, that accused had been wrongly convicted under Section 456 of the Penal Code, as he had none of the intentions necessary to constitute the offence described in Section 451 of the Code, and could hardly have had the intention of committing the offence described in Section 509.

Held, therefore, that inasmuch as the apprehension of accused was illegal under Section 59 of the Criminal Procedure Code, his conviction under Section 224, and that of his brother's, under Section 225 of the Penal Code, must be set aside

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„ „ *Section 509.—See Sections 451, 456, supra.*

Perjury—See Penal Code, Section 194.

„ *Sanction for Prosecution, No. 3.*

Public Servant.—See Penal Code, Section 161.

R.

Railway Act, 1890.—Sections 3, 137—See Penal Code, Section 161.

Rescue from arrest.—See Penal Code, Section 456.

S.

Sanction for Prosecution.—Criminal Courts, Subordination of—Criminal Procedure Code, 1898, Section 195 (7).—See Criminal Courts, Subordination of.

„ „ *Penal Code, Section 194—Sanction for prosecution.—See Penal Code, Section 194.*

„ „ *Sanction for prosecution—Penal Code, Section 193—False evidence—Inquiry under Act XXXVII of 1850—Repeal of Section 17 of Act XXXVII of 1850, effect of—Oaths Act, 1873, Sections 4, 14—Validity of sanction.—Certain persons having given evidence before Commissioners appointed under Act XXXVII of 1850 to hold an inquiry into the behaviour of certain Judicial Officer, the said Commissioners thereafter on the application of the Government Advocate, but without notice to the accused, granted sanction for their prosecution under Section 193 of the Penal Code. At the commencement of the*

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trial before the District Magistrate, preliminary objections were taken as to the nature and validity of the sanction, but were overruled, whereupon accused applied to the Chief Court on the revision side, and it was contended, on their behalf, that the sanction should be set aside because, *inter alia*, (1) the repeal of Section 17 of Act XXXVII of 1850 by Act XII of 1876 showed that it was not intended that witnesses who gave false evidence before a Commission appointed under the first-mentioned Act should be punished therefor, and (2) the sanction was vague and indefinite, granted without notice to accused, and was not necessary for the ends of justice.

Held, that Section 17 of Act XXXVII of 1850 had been repealed merely because the provision therein contained had been rendered obsolete by the enactment of the Penal Code and the Oaths Act, 1873, and that inasmuch as the Commissioners were empowered under Act XXXVII of 1850 to receive and record evidence, they were authorised under Section 4 of the Oaths Act to administer oaths and affirmations in the exercise of the power so conferred on them.

Held, therefore, that under Section 14 of the Oaths Act, witnesses examined before the said Commissioners were bound to state the truth, and rendered themselves liable to be prosecuted under Section 193 of the Penal Code if they testified falsely.

Held, further, that the sanction, read as it should be with the application for sanction, was sufficiently explicit; that under the circumstances of the case previous notice to the accused was unnecessary, and finally that the prosecution of witnesses, who gave false evidence in an inquiry such as that in question was obviously in the interests of justice 18

Security for good behaviour.—See *Criminal Procedure Code*, 1882, Section 110.

Sentence.—Enhancement of.—See *Criminal Procedure Code*, 1898, Section 545.

Sessions Judge—*Criminal Procedure Code*, 1882, Sections 30, 35, 337, 380—*Omission by District Magistrate to submit sentences passed by him for confirmation by Sessions Judge*—*Appeal by accused to Sessions Judge*—*Procedure*—*District Magistrate at whose instance pardon was tendered to approvers trying case himself*—*Penal Code*, Section 395.—See *Appeal in Criminal Cases*, No. 1.

Subordination of Criminal Courts.—See *Criminal Courts*, *Subordination of*—

W.

Warrant.—Act XIII of 1859—*Criminal Procedure Code*, 1898, Sections 5, 83—*Execution of warrants issued under Act XIII of 1859.*—See *Criminal Procedure Code*, 1898, Section 5.

Witnesses for defence, Refusal of Magistrate to summon.—*Practice*—*Refusal of District Magistrate to summon witnesses for defence without expenses being paid by accused.*—An order by a District Magistrate refusing to summon witnesses for the defence without their expenses being paid by the accused, although legal, should be passed very sparingly, and is an improper order in a case where the accused is unable or unwilling to deposit the money, and the result is that he is convicted without his witnesses being heard, especially if the case is not in which a severe sentence is inflicted 7

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TO

REVENUE JUDGMENTS.

1898.

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No.

A.

Acquiescence.—*Occupancy rights, transfer of, by tenant—Effect of acquiescence on part of landlord—Acquiescence, facts constituting.—See Landlord and Tenant.*

Act XVII of 1887.—*See Punjab Tenancy Act, 1887.*

Act XVII of 1887.—*See Punjab Land Revenue Act, 1887.*

Appeal in Revenue Cases.—*Punjab Land Revenue Act, 1887, Sections 13, 112, 116, 118—Application for partition—Plea that holding had been already partitioned privately—Courts of appeal—Question "as to property to be divided" or "as to title in the property of which partition is sought"—Entries in Settlement Records—See Partition.*

" " " *Punjab Tenancy Act, 1887, Sections 5, 6, 8—Suit for declaration of occupancy status of highest class—Duty of Court to consider whether plaintiff entitled to inferior right than that claimed—Civil Procedure Code, 1882, Section 53—Material irregularity—Collector deciding appeal in absence of record, which had been lost.—Plaintiff's suit for a declaration of occupancy status under Section 5 (i) (a) of the Punjab Tenancy Act, 1887, was dismissed by the lower Courts on the ground that as he and his ancestors had always paid half *batai*, he was not entitled to the status claimed. It appeared, however, that plaintiff and his ancestors had held the land for over 40 years before 1870, and had planted fruit trees and erected buildings thereon, but the lower Courts had dismissed the suit without considering whether such occupation entitled the plaintiff to occupancy rights under Section 8 of the Act. It further appeared that the record of the case in the first Court was lost before the Collector heard the appeal.*

Held, that the lower Courts had committed a material irregularity in dismissing the suit without considering whether, with reference to the facts of the case and the district practice, plaintiff was not entitled to occupancy rights of a class inferior to that specifically claimed in the plaint, it being the duty of the Court, in a case such as the present, either to return the plaint for amendment or to amend it itself under Section 53, Civil Procedure Code, *proviso*, and to thereafter frame an issue which should cover the other clauses of Section 5 and Sections 6 and 8 as well.

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Held, further, that the fact that the Collector had had to decide the appeal without being able to examine the record would alone have been a sufficient cause for a remand 3

C.

Civil Procedure Code.—Section 53.—Punjab Tenancy Act, 1887, Sections 5, 6, 8—Suit for declaration of occupancy status of highest class—Duty of Court to consider whether plaintiff entitled to inferior right than that claimed—Practice.—See Occupancy Rights, No. 4.

L.

Landlord and Tenant—Punjab Tenancy Act, 1887, Sections 6, 8, 56, 60—Transfer of rights by occupancy tenant—Acquiescence on part of landlord, effect of—Facts constituting acquiescence.

Held, that when a tenant holding under Section 6 or Section 8 of the Punjab Tenancy Act, 1887, has transferred his right of occupancy without having previously obtained the consent of the landlord in writing unless the landlord sues within a reasonable time to cancel the voidable transfer, his acquiescence may be inferred, and, if proved, will disentitle him to the relief claimed, although his suit has been instituted within the period of limitation, *viz.*, within six years from the date when the right to sue accrued.

Held, further, that though "a reasonable time" must depend on the circumstances of each case, yet in cases in which the payment of rent by the alienee to the landlord or his representative is proved or may be legally presumed, he having already full knowledge of the status of the alienee, the acceptance of such rent by the landlord and his omission to sue for the cancelment of the voidable transfer constitute, in the absence of any satisfactory explanation of his conduct, acquiescence on the part in the transfer.

Held, on the facts of the present case, that the landlord had acquiesced in the transfers, and that, therefore, his suit must be dismissed 1

" " *Punjab Tenancy Act, 1887, Sections 6, 8, 51, 53, 56, 57, 60—Exchange of rights of occupancy without consent of landlord—"Transfer"—Right of landlord who has acquiesced in such transfer to subsequently sue to avoid it—Acquiescence what constitutes.—An exchange of their respective holdings by two tenants holding under Section 8 of the Punjab Tenancy Act, 1887, is a "transfer," within the meaning of Section 56 of the Act.*

When a landlord is fully aware that a tenant holding under Section 6 or Section 8 of the Act has transferred his right of occupancy without having previously obtained the consent in writing of that landlord, unless the latter sues within a reasonable time to cancel the voidable transfer, his acquiescence therein may be inferred, and, if proved, will disentitle him to the relief claimed, although his suit is instituted within six years from the date of transfer. As to what period constitutes "a reasonable time" must depend on the circumstances of each case, but in cases in which the payment of rent by the alienee to the landlord or his representative is proved or may be

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legally presumed, he having already full knowledge of the *status* of the alienee, in the absence of satisfactory explanation by the landlord for his conduct, the acceptance of rent for more than one harvest without bringing a suit for the cancelment of the voidable transfer is an act which amounts to acquiescence 2

O.

Occupancy Rights.—*Punjab Tenancy Act, 1887, Sections 5, 6, 8—Suit for declaration of occupancy status of highest class—Duty of Court to consider whether plaintiff entitled to inferior right than that claimed—Civil Procedure Code, 1882, Section 53—Material irregularity—Collector deciding appeal in absence of record, which had been lost.*—Plaintiff's suit for a declaration of occupancy *status* under Section 5 (i) (a) of the Punjab Tenancy Act, 1887, was dismissed by the lower Courts on the ground that as he and his ancestors had always paid half *batai*, he was not entitled to the *status* claimed. It appeared, however, that plaintiff and his ancestors had held the land for over 40 years before 1870, and had planted fruit trees and erected buildings thereon, but the lower Courts had dismissed the suit without considering whether such occupation entitled the plaintiff to occupancy rights under Section 8 of the Act. It further appeared that the record of the case in the first Court was lost before the Collector heard the appeal.

Held, that the lower Courts had committed a material irregularity in dismissing the suit without considering whether, with reference to the facts of the case and the district practice, plaintiff was not entitled to occupancy rights of a class inferior to that specifically claimed in the plaint, it being the duty of the Court, in a case such as the present, either to return the plaint for amendment or to amend it itself under Section 53, Civil Procedure Code, *proviso*, and to thereafter frame an issue which should cover the other clauses of Section 5 and Sections 6 and 8 as well.

Held, further, that the fact that the Collector had had to decide the appeal without being able to examine the record would alone have been a sufficient cause for a remand 3

P.

Partition.—*Punjab Land Revenue Act, 1887, Sections 13, 112, 116, 118—Application for partition—Plea that holding had been already partitioned privately—Course of appeal—Question "as to property to be divided" or "as to title in the property of which partition is sought"—Entries in Settlement Records.*—Plaintiff applied to the Assistant Collector for partition of certain land recorded as jointly held by him and defendants. The latter resisted partition on the ground that the land had already been privately partitioned, though effect to such private partition had not been given in the annual papers. The Assistant Collector prepared a mode of partition for part of the land, but refused the application in regard to the balance, whereupon plaintiff appealed to the Collector for partition of the rest of the holding. The Collector returned the appeal, and directed it to be presented to the Commissioner, as the dispute concerned "the property to be divided" within the meaning of Section 118 (1) and (2) of the Punjab Land Revenue Act, 1887. The Commissioner held that the order of the Collector was wrong, and referred the question of jurisdiction to the Financial Commissioner.

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Held, that the appeal lay to the Collector and not to the Commissioner, the objection that certain land had already been partitioned, though still recorded as jointly held, disputing the correctness of an entry in a record presumed to be true, and consequently raising "a question of title" within the meaning of Section 116 of the Punjab Land Revenue Act, 1887.

The principles which should guide the Courts in such cases explained 4

Punjab Land Revenue Act, 1887.—Section 13.—See Partition.

" " " " " *Section 112.—See Partition.*

" " " " " *Section 116.—See Partition.*

" " " " " *Section 118.—See Partition.*

Punjab Tenancy Act, 1887.—Section 5.—See Occupancy Rights.

" " " " " *Section 6.—See Landlord and Tenant.*
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" " " " " *Section 8.—See Landlord and Tenant.*
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" " " " " *Section 51.—See Landlord and Tenant.*

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R.

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CIVIL JUDGMENTS,
1898.

Chief Court of the Punjab.

CIVIL JUDGMENTS.

No. 1.

Before Sir Charles Roe, Kt., Chief Judge.

KHAIRA AND OTHERS,—(PLAINTIFFS),—APPELLANTS,

Versus

PIR BAKHSH AND ANOTHER,—(DEFENDANTS),—
RESPONDENTS.

} APPELLATE SIDE.

Case No. 1180 of 1897.

Custom—Adoption of sister's son—Muhammadian Jats of Zira tahsil, Ferozepore District.

Found, that defendants, upon whom the *onus* rested, had failed to prove that by custom among Muhammadian Jats of the Zira tahsil, Ferozepore District, the adoption of a sister's son is valid in the presence, and without the consent, of the adoptive father's agnates.

Further appeal from the order of Khan Muhammad Hayat Khan, C. S. I., Additional Divisional Judge, Ferozepore Division, dated 3rd July 1897.

Janki Nath Kaul, for appellants.

The preliminary order of the learned Chief Judge, in chambers, was as follows:—

Roe, C. J.—There is certainly a strong initial presumption against the validity of the adoption of a sister's son by a Muhammadian Jat of the Zira tahsil of the Ferozepore District. The *Rivaj-i-am* is against it, and the report of the local Commissioner (the Tahsildar) is against it. The instances given of such an adoption, even if duly verified, *i.e.*, if it were proved that the person adopted actually succeeded to land to the exclusion of agnates, seem quite insufficient to prove a custom sanctioning such adoptions. It is not correct to speak of the *Rivaj-i-am*, and the Settlement Officer (Mr. Francis) commenting on it as showing that such a custom previously existed, but was changed at settlement; what really happened was that the persons recording the answers in the *Rivaj-i-am*, whilst admitting that isolated cases of such adoption might have occurred in earlier times, declared that the general custom of their tribe did not recognize them. Admitted.

Jaishi Ram and Lajpat Rai, for appellants.

Sham Lal, for respondents.

The judgment of the learned Chief Judge was as follows :—

7th Feby. 1898.

ROE, C. J.—My order of the 11th December may be read as a part of my present order.

As therein remarked, it was certainly for the defendant to prove that the adoption was valid by custom. Only four instances of such adoption are given, and they occurred long ago. Even if they were proved fully, as stated in my note, they would be quite insufficient to prove a custom. It is not denied that such adoptions could take place with the consent of the agnates, and in early days, when land was of little value, they were sometimes made without opposition. But it is quite incorrect to say that there was ever a custom allowing them to be made in spite of the opposition of the agnates.

The decision of the lower Court is reversed, and plaintiffs will receive a declaratory decree that the adoption now challenged is invalid, and will not affect their right as reversioners. As usual in these cases, the parties will pay their own costs throughout.

Appeal allowed.

No. 2.

Before Mr. Justice Frizelle and Mr. Justice Stogdon.

PIRTHI MAL,—(PLAINTIFF),

Versus

MUSSAMMAT BHAGAN,—(DEFENDANT).

Case No. 6 of 1897.

REFERENCE SIDE. {

Contract Act, 1872, Section 23—Immoral contract—Suit for rent for house let to prostitute.

Plaintiff, who was the owner of a house which he had let to defendant, a prostitute, in the ordinary way of business, sued for recovery of the rent. It appeared that plaintiff probably knew that defendant was a prostitute, but it was not shown that the house was let for the express purpose of being used as a brothel or that plaintiff was to have any share in, or receive rent out of, defendant's earnings as a prostitute.

Held, that the agreement was not immoral, and that plaintiff was entitled to recover the rent due thereunder.

Case referred by M. L. Waring, Esquire, Judge, Small Cause Court, Kasauli.

The opinion of the Court was as follows :—

5th Jany. 1898.

FRIZELLE, J.—Plaintiff is the owner of a house and has let it on rent to defendant, who is a prostitute. We are asked

by the lower Court whether under Section 23 of the Indian Contract Act plaintiff can maintain a suit for recovery of the rent, as the house was let for an immoral purpose. It appears that the house was let in the ordinary way of business. Plaintiff probably knew that defendant is a prostitute, but there is nothing to show, and it is not alleged, that the house was let for the express purpose of being used as a brothel or that plaintiff was to have any share in defendant's earnings as a prostitute or to receive the rent out of those earnings. Under the circumstances we are of opinion that the agreement was not immoral. The lower Court should decide the case accordingly.

No. 3.

Before Sir Charles Roe, Kt., Chief Judge.

MUSSAMMAT MANSO,—(PLAINTIFF),—APPELLANT,

Versus

RATNU,—(DEFENDANT),—RESPONDENT.

} APPELLATE SIDE.

Case No. 712 of 1897.

Custom—Succession—Right of daughter to succeed to her father's first cousin—Kanets of Kangra District.

Found, that plaintiff had failed to prove that, by custom among Kanets of Kangra District, a woman is entitled to succeed to the estate of her father's first cousin after the succession and subsequent death of the latter's widow, to the exclusion of the agnatic heirs.

Semble: Among Kanets of the Kangra District, a daughter is entitled to succeed to her father's estate to the exclusion of remote collaterals.

Further appeal from the order of R. Sykes, Esquire, Divisional Judge, Kulu, at Dharmsala, dated 19th March 1897.

The judgment of the learned Chief Judge was as follows:—

ROE, C. J.—After hearing Mr. Golak Nath on the 6th instant, and reading the evidence, I am of opinion that the decision of the Divisional Judge is right. As observed by him, the question is not whether a daughter succeeds to her father's estate to the exclusion of remote collaterals,—a proposition which finds support in the *Riwaj-i-am* of Kangra and in the evidence of the present case,—but whether a daughter succeeds to the estate of her father's first cousin after the latter's widow's succession and death, to the exclusion of the agnatic heirs. This is a very different proposition, and it appears to me quite opposed to the fundamental principle of Tribal law, which is that of agnatic

8th Jany. 1898.

succession. This principle is occasionally modified in favour of daughters (1) by allowing them to hold the estate till marriage, in lieu of the maintenance and marriage expenses to which they are undoubtedly entitled, (2) by allowing them to succeed and pass on the estate to their sons, who, when the agnates are very remote, may be regarded as the natural heirs of the last male owner. But to allow a female to practically take up a position as an agnate, and take the estate of her father's cousin, and hold it at any rate for life just as if she were an agnate, is, as I have said, a totally different matter, and the evidence in the present case quite fails to prove that such is the custom.

The Divisional Judge is also right in holding that the matter is not *res judicata*: assuming that it is so as regards Nokhu, that would not affect the other agnates. The only result of excluding Nokhu would be that the others would step into his place.

The decision is confirmed under Section 551, Civil Procedure Code.

No. 4.

Before Mr. Justice Frizelle and Mr. Justice Stogdon.

Mr. R. SYKES,

Versus

THE MUNICIPALITY OF DHARMSALA.

CASE No. 7 OF 1897.

Punjab Municipal Act, 1891, Sections 2 (2), 45 (8) (c)—Tax leviable by the year.

Held, that in a Municipality governed by Act XX of 1891, a tax leviable by the year is, under Section 45 (8), proviso (c), leviable by the Calendar year from the 1st January to the 31st December, and that the said proviso relates equally to taxes which were imposed before the said Act came into force and which had hitherto been levied by the Financial year from the 1st April to the 31st March.

Case referred by Major F. W. Egerton, District Judge, Kangra.

The order of the Chief Court was as follows:—

11th Jany. 1898.

STODDON, J.—The question we are asked to decide is whether, in a Municipality governed by Act XX of 1891, a tax leviable by the year is leviable by the Calendar year from the 1st January to the 31st December, or by the Financial year from the 1st April to the 31st March following.

In our opinion it is clear from Section 45, sub-section 8, proviso (c), that it is leviable by the Calendar year, if imposed

under Act XX, 1891. The only question is whether the proviso in question relates to taxes which were imposed long before Act XX, 1891, came into force, and which have hitherto been levied by the Financial year. It is clear from Section 2, subsection (2), that such taxes, though imposed under a previous Act, must, so far as may be, be deemed to have been imposed under Act XX of 1891. Such being the case, the proviso relates to them, and they are leviable by the Calendar year, and that is our answer to the reference.

No. 5.

Before Sir Charles Roe, Kt., Chief Judge, and Mr. Justice Reid.

MUSSAMMAT GULAB KHATAN AND OTHERS,—
(DEFENDANTS),—APPELLANTS,

Versus

MIAN MUHAMMAD AND OTHERS,—(PLAINTIFFS),—
RESPONDENTS.

} APPELLATE SIDE.

Case No. 281 of 1896.

Limitation Act, 1877, 2nd Schedule, Article 93—Suit for declaration that an alleged will was a forgery and that testator had no power to make such will—Custom—Succession of daughter.

On the death in 1866, of one M. M. who left a widow and three daughters, mutation of names in respect of his property was effected in favour of the widow, who applied in 1877 to have mutation in respect of three-fourths of the said property effected in favour of the daughters, in virtue of a will purporting to have been executed in their favour by M. M. shortly before his death. This application was resisted by the present plaintiffs, collaterals of M. M., and rejected on the ground that the will was probably a forgery. In 1872 and 1887 the widow dealt with the property in suit as her own, and on the second occasion plaintiffs obtained a decree declaring that her dealings with the property did not affect their reversionary rights. In 1894 the daughters sued the widow for possession of three-fourths of the said estate and obtained a decree on a confession of judgment. Plaintiffs, who were no parties to the said suit, in November 1894, instituted the present suit for a declaration that (i) the said will was a forgery, (ii) M. M. had no power to make such a will, and that if genuine, it was never acted on and was inoperative, and (iii) that the decree in favour of the daughters was collusive and inoperative against their rights as reversioners. Defendants pleaded that plaintiffs' suit was barred by limitation, that the will was genuine, and that, in any event, the daughters were entitled to succeed in preference to male collaterals such as the plaintiffs.

Held, (i) that the proceedings in 1894 gave rise to a fresh cause of action, and that the suit was within limitation; (ii) that the alleged will had not been proved to be genuine; and (iii) that no special custom had

been proved to exist among the parties whereby daughters were entitled to succeed in the presence of male collaterals.

Further appeal from the order of D. O. Johnstone, Esquire, Divisional Judge, Jhelum Division, dated 23rd December 1895.

K. P. Roy, for appellants.

Browne, for respondents.

The judgment of the Court was delivered by

14th Jany. 1898.

REID, J.—The plaintiffs, respondents, are male collaterals of one Mian Muhammad, who died in 1866 leaving a widow and three daughters. On his death mutation of names in respect of his property was effected in favour of the widow, who applied in 1877 to have mutation in respect of three-fourths of the property effected in favour of the daughters in virtue of a will purporting to have been executed in their favour by Mian Muhammad shortly before his death. This application was resisted by the respondents, and rejected on the ground that the will contained alterations and was probably a forgery.

In 1872 and in 1887 the widow dealt with the property in suit as her own, and on the second occasion the respondents obtained a decree declaring that her dealings with the property did not affect their reversionary rights.

In 1894 the daughters sued the widow for possession of three-fourths of the estate left by their father, and obtained a decree on a confession of judgment. The respondents were not parties to this suit, and in November 1894 instituted the present suit for a declaration—

- (a) that the will in question was a forgery;
- (b) that Mian Muhammad had no power to make such a will, and that, if genuine, it was never acted on, and was inoperative;
- (c) that the decree of 1894 in favour of the daughters be declared collusive and inoperative against the rights of the respondents.

The Court of first instance held that there were good and reasonable grounds for holding that the will was a forgery, and passed a decree declaring (a) that the will was never acted on and was inoperative, (b) that the decree of 1894 was collusive and did not affect the rights of the respondents.

This decree was affirmed by the learned Divisional Judge, who held that a suit merely for a declaration that the will

was a forgery would have been barred by Article 93, Schedule II, of the Limitation Act, but that it was unnecessary to discuss that question, no declaration to that effect having been decreed. It was further held that the will was a forgery, and had never been acted on, while it was probably opposed to custom, and that the decree of 1894 was collusive.

The first question for decision is whether the suit was within limitation.

The pleader for the appellants relies on No. 57, *Punjab Record*, 1891, No. 52, *Punjab Record*, 1895, and No. 75, *Punjab Record*, 1896, for the proposition that Article 93 is applicable and that the suit is barred, not having been instituted within three years of the attempt to use the will against the respondents.

As recently pointed out in a judgment of this Court, the authorities relied on are not applicable to a case in which the instrument set up can be ignored by the plaintiff.

In No. 75, *Punjab Record*, 1896, the plaintiff was an executant and pleaded undue influence, and minority at date of execution.

In No. 52, *Punjab Record*, 1895, the principle laid down was that in all suits in which there is a document, executed either by the plaintiff himself or those under whom he claims, which may be pleaded in complete bar of the claim, the plaintiff must fail unless he is in time for claiming cancellation of such deed. The respondents do not claim through Mian Muhammad, but through their and his common ancestor. They assert that Mian Muhammad had no power to transfer the property in suit by will.

In No. 57, *Punjab Record*, 1891, the transferrer was the elder brother and *sarbarah* of the plaintiff, for whom he purported to act. The Full Bench rulings of this Court, No. 116, *Punjab Record*, 1890, and No. 18, *Punjab Record*, 1895, are in favour of the proposition that the present suit is within time, and it is clear that the proceedings of 1894 gave rise to a fresh cause of action. We have no hesitation in holding that the plea of limitation fails. It is further contended that the will is genuine, and that the reasons given by the lower Appellate Court for holding that it is a forgery are unsound. Although the argument that the possible birth of a son need not have been provided for by the will, as such son would take in preference to the daughters, has force, the other reasons given by

the Courts below for holding that the will was a forgery have force, and we hold that the appellants have signally failed to prove that it is genuine.

In this view of the facts it is unnecessary to enter into the question whether such a will, if genuine, would be valid.

It has been further argued that the daughters are entitled to succeed in preference to the respondents. No evidence has been adduced in support of this proposition, and we must hold that no special custom to this effect has been proved. On the contrary, the whole course of action of the appellants and the widow proves that they never had the least idea that the claims of daughters were preferential to those of the respondents; there would otherwise have been no necessity for setting up the will, and the rights of the daughters, as such, were not set up in the memorandum of appeal in the lower Appellate Court. The appeal fails and is dismissed with costs.

Appeal dismissed.

No. 6.

Before Mr. Justice Chatterji and Mr. Justice Clark.

APPELLATE SIDE. {

KHANU MAL,—(PLAINTIFF),—APPELLANT,

Versus

KHAN MUHAMMAD AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

Case No. 1248 of 1896.

Adverse possession—Mortgages in possession—Adverse possession as regards mortgagee, effect of, upon rights of mortgagor.

Held, that inasmuch as a mortgagor, who has transferred possession of the mortgaged land to the mortgagee, has no right to possession thereof until he has redeemed the mortgage, the possession of a third party, though adverse as regards the mortgagee whom he has ousted, does not, when unaccompanied by further acts of aggression upon the mortgagor's rights, give any cause of action to the latter during the continuance of the mortgage, and that, therefore, the burden of proving that his possession was adverse as against the mortgagor no less than as against the mortgagee rests upon such third party.

I. L. R., XVIII, Bom., 51, followed.

Held, upon the facts of the case, that defendants had failed to prove that their possession was adverse as against the plaintiff-mortgagor.

Further appeal from the order of Captain C. S. Martindale, Divisional Judge, Mooltan Division, dated 29th August 1895.

Lal Chand, for appellant.

Oertel, for respondents.

The judgment of the Court was delivered by

CLARK, J.—Plaintiff was the owner of the well; in 1862 4th Jany. 1898. (Sambat 1917), he sold $\frac{1}{8}$ and mortgaged $\frac{1}{8}$ to defendants 1 and 2; he has now redeemed $\frac{1}{8}$ of the $\frac{1}{8}$ mortgaged, and claims possession; he is resisted by defendants 3 to 8, who are the sons and relatives of Arif Khan.

Defendants 3 to 8 say that the well is their ancestral property, and that they have had adverse possession for over 12 years.

The issues are—1, is the land in dispute ancestral property of Arif Khan?

2. Have defendants 3 to 8 acquired title by adverse possession?

At mutation of names during the Settlement of 1878 the statements of all parties—plaintiff, defendants 1 and 2, and Arif Khan—were recorded, and throw a clear light on the case.

Arif Khan then stated that plaintiff had sold and mortgaged $\frac{1}{8}$ to defendants 1 and 2, and that he had bought $\frac{1}{8}$ from defendants 1 and 2, and had taken the other, $\frac{1}{8}$ which had been given up by defendants 1 and 2 on account of *khasara*; he had admittedly become the purchaser of the other $\frac{1}{8}$, and he claimed to be recorded as owner of the whole well, as he had borne the *nafa-nuksan* for 20 years.

The order of 22nd November 1878 was, that Arif Khan should be recorded as proprietor of $\frac{1}{8}$ of the well, and plaintiff as proprietor of $\frac{1}{8}$ with defendants 1 and 2 as mortgagees for Rs. 700, and this is the entry still kept up in the revenue records. There has been a mistake by which Arif Khan is recorded as owner of the $\frac{1}{8}$, and plaintiff of $\frac{1}{8}$, but this is not of importance; it is only a case of the figures having become inverted.

On issue 1 it is clear, then, that the land in dispute is not the ancestral property of Arif Khan, and this was what was found by both Courts. The land originally belonged to plaintiff, who mortgaged it to defendants 1 and 2 about 1862, and Arif Khan acquired it from defendants 1 and 2 in some way not satisfactorily explained, and has been holding it any way for 14 years without making any payment to defendants 1 and 2. It is noticeable that in 1878 both defendants 1 and 2 and Arif Khan claimed to be in possession of the land.

With reference to the question whether defendants 3 to 8 have acquired title to the land by adverse possession, the first

Court found that they had not, but the Divisional Judge found that they had, relying on *Punjab Record* No. 161 of 1889.

That judgment is, however, if anything, against them. There the party in possession set up a title derived from a third person, and no way from the mortgagee; and Mr. Justice Rivaz there stated that where the person in possession sets up a title derived from the mortgagee, as, for instance, where the mortgagee has transferred his rights as such, or otherwise permitted a stranger to occupy the land, the party in possession is technically the mortgagee, and can be redeemed by the mortgagor within 60 years. We think it must be held that Arif Khan was permitted to occupy by the mortgagee.

He was a shareholder in the well of $\frac{1}{16}$ by purchase from defendants 1 and 2, and must have well known that defendants 1 and 2 were only mortgagees of the $\frac{1}{16}$ in dispute; he must also have known that plaintiffs were recorded as proprietors of this $\frac{1}{16}$ in the revenue records. His possession may have been adverse to the mortgagees, but there is no ground for thinking that it was adverse to the mortgagors. Adverse possession is defined by Mr. Justice Markby as possession by a man holding the land on his own behalf, or on behalf of some person other than the true owner, the true owner having a right to immediate possession (*I. L. R., IV Cal., 327*). A mortgagor has not a right to possession until he has redeemed the mortgage. According to *I. L. R., XVIII Bom., 51*, it lay upon defendants 3 to 8 to prove that their possession was adverse to the mortgagor. Mr. Justice Fulton remarks in that case: "*In L. R., XIV Bom., 176*, it was held that there can be an invasion of the rights of the mortgagor of such a nature as to render the possession of a trespasser on the property adverse to him. But I think that although the possession of a trespasser may undoubtedly be adverse to the mortgagor, the burden of proving when it becomes so rests on the former. *Prim& facie* by his act of possession he merely ousts the mortgagee, who is entitled to hold the property. Such ouster, unaccompanied by any further acts of aggression on the mortgagor's rights, cannot give any cause of action to the latter. During the continuance of the mortgage, the mortgagor cannot sue to recover possession of the land."

We do not think defendants have shown that their possession was adverse to plaintiff. Plaintiff is therefore entitled to recover the land.

We accept the appeal and restore the order of the first Court with costs throughout.

Appeal allowed.

No. 7.

Before Sir Charles Roe, Kt., Chief Judge.

MUHAMMAD AZIM, APPELLANT,

Versus

MUHAMMAD JI, RESPONDENT.

} APPELLATE SIDE.

Case No. 1319 of 1897.

*Application to remove guardian on ground of failure to furnish security—
Ex-parte order removing guardian—Application to set aside ex-parte order—
Procedure.*

Appellant was duly appointed guardian and received a certificate, but the order of the Court appointing him, while directing him to file security, did not specify the amount thereof, or the time within which it was to be filed. Subsequently, on an application by respondent, the District Judge in an *ex-parte* order directed that the guardian should be removed on the ground that he had not furnished security within a reasonable time. The guardian's application to have the *ex-parte* order set aside was rejected on the ground that his only remedy was by way of appeal therefrom.

Held, that the District Court had erred in holding that the application to have the *ex-parte* order set aside could not be entertained, the provisions of the Civil Procedure Code as regards procedure being applicable to cases under the Guardian and Wards' Act, unless the contrary is expressly declared.

Held, further, that the guardian should not have been removed for failure to give security, until a distinct order had been passed fixing the amount and the time within which it was to be filed, and the guardian had thereafter failed to comply with such order.

*Miscellaneous appeal from the order of Lieutenant B. C. Waterfield,
District Judge, Peshawar, dated 23rd October 1897.*

Muhammad Shah Din, for Appellant.

Oertel and Gokal Chand, for Respondent.

The judgment of the learned Chief Judge was as follows:—

Roe, C. J.—The facts are briefly that Muhammad Azim 18th Jan. 1898 was duly appointed guardian and received a certificate. The order appointing him directed him to file security, but did not mention the time within which this was to be done.

On an application by Muhammad Ji for his removal, which alleged various grounds, and, amongst others, a failure to

furnish security, the District Judge, in an *ex-parte* order, dated 24th September, dealing with the last allegation alone, held that as the guardian had not furnished security within a reasonable time, he should be removed, and the order was made accordingly.

The guardian's application to have the *ex-parte* order set aside was rejected on the ground that the only remedy was an appeal. Two appeals have been preferred, one against the order refusing to set aside the *ex-parte* order and the other on the merits.

I think that the grounds for setting aside the *ex-parte* order are good, and the Lower Court was wrong in holding that the application could not be entertained. The general provisions of the Civil Procedure Code as regards procedure are applicable to cases under the Guardian and Wards' Act, and indeed to all cases under special Acts, unless the contrary is expressly declared.

As regards the appeal on the merits, it is clear to me that the District Judge should not have removed Muhammad Azim for failure to give security, until a distinct order had been passed fixing the amount and the time within which it was to be filed. I, therefore, set aside the order of removal, and direct the District Judge to proceed afresh to the consideration of the petition of Muhammad Ji and its various allegations. If he is then of opinion that the one regarding failure to furnish security is the only one which requires an answer, he should, as directed above, call on the guardian to furnish security for a specific sum by a certain date, and defer further orders till this date is passed.

Law stamp on these two appeals to be refunded. The other costs in this Court will be paid by the parties incurring them.

Appeal allowed.

No. 8.

Before Mr. Justice Frizelle.

INAYAT ALI,—(JUDGMENT-DEBTOR),—PETITIONER,

*Versus*LACHMAN SINGH, MINOR, THROUGH MUS- } RESPON-
SAMMAT MAHTABI,—DECREE-HOLDER,— } DENT.

} REVISION SIDE.

Case No. 1426 of 1897.

Civil Procedure Code, 1882, Section 108—Money paid into Court—Ex-parte decree upheld—Application by decree-holder for payment of deposit—Execution of decree—Limitation Act, 1877, 2nd Schedule, Article 179.

When a sum of money is paid into Court under Section 108, Civil Procedure Code, in order to be delivered to plaintiffs, should the *ex-parte* decree be upheld, such sum becomes the decree-holder's money as soon as the *ex-parte* decree is upheld, and it is not necessary for him to apply for execution of the decree in order to obtain payment of the money.

When, therefore, in such a case the decree-holder applied for payment of the deposit more than three years after the decree was passed,

Held, that such application could not be considered an application for execution of decree, and was not barred under Article 179 of the 2nd Schedule to the Limitation Act.

Petition for revision of the order of G. L. Smith, Esquire, Divisional Judge, Delhi Division, dated 18th February, 1897.

Muhammad Shah Din, for petitioner.

Madan Gopal, for respondent.

The judgment of the learned Judge was as follows :—

FRIZELLE, J.—A decree was passed against the petitioner 25th Jany. 1898. (Inayat Ali) in favour of Dil Singh on the 21st January 1892. It had been originally *ex parte*, but, on the application of the judgment-debtor, the *ex-parte* decree was set aside on condition of the amount of the decree (Rs. 515-13-3) being paid into Court, under Section 108, Civil Procedure Code. The decree-holder died soon after the decree was passed, and the money remained lying in Court in deposit. On 12th July 1895 the judgment-debtor applied for return of the money. The application was opposed by the present respondent, as heir of the decree-holder, and respondent was then ordered to apply for execution of the decree. He has now, on 28th May 1896, applied for payment to him of the Rs. 515-13-3 deposited in Court, and the first Court ruled that this application was barred by time, as made more than three years after the decree was passed, and rejected the application. The Divisional Judge has reversed this order, and I am of opinion that

the Divisional Judge was right. The money was paid into Court under Section 108 in order to be delivered to plaintiff should the *ex-parte* decree be upheld. When the decree was upheld the money became the decree-holder's money, and no application for execution was necessary for the decree-holder to become entitled to it. His application for the money therefore cannot be considered an application for execution, *vide Punjab Record* 107 of 1881 and 27 of 1888.

On this view of the case, it is not necessary to decide whether the application is saved by Section 7 of the Limitation Act, but even if the application were to be treated as one for execution of decree, I should have no hesitation in holding that it is within time under Section 7. The respondent is admittedly still a minor, and the first Court finds that he is the sole heir of Dil Singh under a will. If, as contended for the judgment-debtor, he has not been proved to be the sole heir, and there are other joint creditors, it does not appear how a discharge from the debt under the decree could have been given by any one of them without the consent of the others ; Section 8 is therefore inapplicable.

I dismiss the petition with costs.

Application dismissed.

No. 9.

Before Sir Charles Roe., Kt., Chief Judge.

APPELLATE SIDE. { SARDAR SARUP SINGH,—(PLAINTIFF),—APPELLANT,
Versus
SUNDAR AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

Case No. 1302 of 1897.

Custom—Succession—Ala and adna maliks—Mauza Manabad, tahsil Moga, Ferozepore District.

Held, that in *Mauza Manabad, tahsil Moga, Ferozepore District*, an *ala malik* is merely entitled, as a *taluqdar*, to 5 per cent. on the revenue, and further, that on the death of an *adna malik* without issue, the latter's estate does not revert to the *ala maliks*, but to the collaterals of the deceased.

Semble : In the said village, which is divided into *pattis*, on the death of an *adna malik* his land would, for default of nearer heirs, become *shamilat* of the *patti* and be divided among the *pattidars*.

Further appeal from the order of A. E. Hurry, Esquire, Divisional Judge, Ferozepore Division, dated 9th August 1897.

Roushan Lal, for appellant.

Dharm Das, for respondent.

The Judgment of the learned Chief Judge was as follows:—

ROE, C. J.—I think the decision of the Lower Courts 28th Jany. 1898. right. The case quoted for the appellant, No. 175 of 1888, cannot be taken as laying down any universal rule as to the rights of *ala maliks* and the burden of proof. It is obvious that the position of *ala maliks* varies greatly in different parts of the country. In some they are the real proprietors, and the *adna malik* is little more than a tenant with a right of occupancy. In other parts, the *adna maliks* are the real proprietors, and the *ala malik* is merely a *taluqdar* receiving a certain percentage on the revenue. In the present case, all that the *ala malik* is shown as entitled to is 5 *per cent.* on the revenue; there is no provision in the *Wajib-ul-arz* declaring that if an *adna malik's* line dies out, his land will revert to the *ala malik*, nor is there any instance of the plaintiff's thus acquiring an *adna malik's* holding. The history of the village, so far as it can be traced from the extracts from the pedigree table put up with the record, clearly suggests the inference that in the *pattis* which the *Sardar* who founded the village made over to the settlers, mostly his own relatives, whom he invited in, he retained nothing more than his 5 *per cent.* on the revenue; and the strong presumption is that, even if the defendants were not the collaterals of Baghel Singh, they would take his land merely as *adna maliks* of the *patti*, that is, the land of Baghel Singh would, for default of nearer heirs, become *shamilat* of the *patti*, and be divided amongst the *pattidars*, *i. e.*, the *adna maliks*.

Plaintiff's claim to succeed as the agnate heir of Baghel Singh is quite untenable. The decision is confirmed, and the appeal dismissed with costs.

Appeal dismissed.

No. 10.

Before Mr. Justice Reid.

MUSSAMMAT HEM KAUR,—(PETITIONER),

Versus

RAI DAULAT RAM,—RESPONDENT.

CASE No. 1974 of 1897.

Guardian and Wards Act, 1890, Sections 12 (3) (b), 47—Preliminary order as to custody of property—Revision—Civil Procedure Code, 1882, Section 591.

At the hearing of an application, under Act VIII of 1890, for the custody of the person and property of a minor at the time living with

} REVISION SIDE.

his step-mother, the Court by an interlocutory order issued a commission to a certain *Munsif* to make a list of the property of the minor and to lodge it in Court for safe custody, care being taken that the step-mother was given the necessary utensils, clothes, &c., for her support and maintenance. The step-mother applied to the Chief Court on the Revision Side to set aside the said order, but it was objected on behalf of the respondent that, inasmuch as an appeal from the final order of the Lower Court in this case lay to the Chief Court, the order in question was not open to revision. On behalf of petitioner it was contended that, the property affected being in her possession, no order passed in appeal could remedy the injury caused by the order, which was *ultra vires* with reference to the provisions of Section 12, sub-section (3), clause (b), of Act VIII of 1890, and, further, that the petitioner was not bound to appeal against an order appointing the respondent guardian, while, in the event of his application being dismissed, she could not appeal against the order in question, which in any event did not affect the decision of the case, in the terms of Section 591 of the Civil Procedure Code.

Held, that the order in question being passed by the Court for the temporary custody and protection of the minor's property, and the custody of the *Munsif* being in effect the custody of the Court, did not violate the rule contained in Section 12 (3) (b) of Act VIII of 1890, and that the words "any person" in the said clause could not be interpreted to include the words "the Court."

The Court being satisfied that this was not a case in which the revisional powers of the Court should be exercised, dismissed the application.

Petition for revision of the order of Khan Bahadur Sayad Muhammad Latif, District Judge, Jullundur, dated 10th November 1897.

Beechey, for petitioner.

W. H. Rattigan, Madan Gopal and Bhagat Ram, for respondents.

The judgment of the learned Judge was as follows:—

25th Jany. 1897.

REID, J.—A preliminary objection was raised by the learned counsel for the respondent to the effect that, inasmuch as an appeal from the final order of the Lower Court in this case lies to this Court, no revision lies.

The order of which revision is sought was passed during the hearing of an application under Act VIII of 1890 for the custody of the person and property of a minor at the time living with his step-mother, his father's widow, and was as follows:—"I therefore issue a commission to Lala Atma Ram, "*Munsif*, to make a list of the property of the minor and to lodge it in Court for safe custody, care being taken that the "widow is given the necessary utensils, clothes, &c., for her "support and maintenance,"

Under Section 47 of the Act an appeal lies to this Court from an order appointing or refusing to appoint a guardian, and under Section 591 of the Code of Civil Procedure any irregularity or illegality in the order now in question might be set forth as a ground of objection in the memorandum of appeal, so far as it affected the decision of the case.

The learned counsel for the respondent quotes 114 *Punjab Record*, 1883, 125, *Punjab Record* 1892, *Chattar Singh v. Lekhraj Singh*, I. L. R., V All., 293, and *Farid Ahmad v. Dulari Bibi*, I. L. R., VI All., 233, as authority for the proposition that revision does not lie.

For the petitioner it is argued that the order in question is *ultra vires*, having regard to the provisions of Section 12 (3) (b), Act VIII of 1890, the property affected being in possession of the petitioner, and that no order passed in appeal could remedy the injury caused by the order. It is further argued that the petitioner is not bound to appeal against an order appointing the respondent guardian, while in the event of his application being dismissed she could not appeal against the order in question, and that in any event the order does not affect the decision of the case, in the terms of Section 591. Reliance is placed on a dictum in *Moti Lal Kashibhai v. Nana*, I. L. R., XVIII Bom., 35, to the effect that the object of Section 622 of the Code of Civil Procedure is to enable a party to a suit to get a decision or order of a Lower Court rectified by a High Court, when there would otherwise be no remedy. It is argued that the effect of the order in question is to deprive the petitioner of her property, and that it is inequitable that she should be compelled to wait for its restoration till she can file an appeal.

The order in question differs from those dealt with in the authorities relied on by the learned counsel for the respondent, and from the order in XVIII, Bom., in that it cannot be said to affect the decision of the case. At the same time, I do not feel called on to decide whether such an order could under any circumstances be revised, inasmuch as the order in question does not, in my opinion, violate the rule contained in Section 12 (3) (b).

The order was passed by the Court for the temporary custody and protection of the property of the minor, and the *Munsif* to whom the order was directed was apparently selected as the instrument of the Court, as being a person in whose discretion and honesty full confidence could be placed. His custody was the custody of the Court, and I cannot interpret

the words "any person" in Section 12 (3) (b) to include the words "the Court." In any event, whether my interpretation of the Section in question is correct or not, I am satisfied that this is not a case in which the revisional powers of this Court should be exercised. It is therefore unnecessary to refer the point raised to a Bench as *res integra*. Any claim to property made by the petitioner will, in due course, be investigated by the Court below.

I dismiss the application and, having regard to the position of the parties, I leave them to pay their own costs.

Application dismissed.

No. 11.

Before Mr. Justice Stogdon.

APPELLATE SIDE. { ALAM SHER,—(PLAINTIFF),—APPELLANT,
Versus
RAM CHAND AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

Case No. 1383 of 1897.

Pre-emption—Punjab Laws Act, 1872, Section 9—Rights to use water of perennial stream—"Immovable property"— General Clauses Act, 1868, Section 2 (5).*

Held, that inasmuch as the water of a perennial stream comes out of land, the right to use such water is "a benefit arising out of land," and is, therefore, "immovable property" within the meaning of Section 2 (5) of the General Clauses Act, 1868, so as to found a suit for pre-emption in respect of a sale thereof under Section 9 of the Punjab Laws Act, 1872.

Further appeal from the order of Rai Bahadur Lala Buta Mal, Divisional Judge, Jhelum Division, dated 4th November 1897.

Lal Chand, for appellant.

Gobind Ram, for respondents.

The judgment of the learned Judge was as follows :—

3rd Feby. 1898.

STODDON, J.—There is a perennial stream (Jai), from the water of which certain lands in the village of Katha Masral in the Khushab *tahsil* of the Shahpur District are irrigated Ahla, Ali and their minor brother Wir Khan owned, along with other persons, the right to irrigate for three watches (*pahar*). The share of Ahla and his brothers was one-third, or one watch. All three watches are mortgaged for Rs. 800 to one Karam. On the 1st November 1895, Ahla and Ali, for themselves and Wir Khan, sold their equity of redemption of their one-third share to Ram Chand and Aya Ram for Rs. 333.

* Now replaced by Act X of 1897, Section 3 (25)—*Ed., P. R.*

Alam Sher sued for pre-emption. In their written answer the vendees admitted his right, but their pleader subsequently urged that the property sold was not immovable, and could not therefore be the subject of pre-emption under Section 9 of the Punjab Laws Act, 1872. Wir Khan by his guardian *ad litem* pleaded that the sale of his share, not having been made for his benefit, was bad. The first Court held that the property was immovable, and that the sale of Wir Khan's share was illegal. It therefore gave plaintiff a decree for pre-emption of a $\frac{2}{3}$ share of the right claimed. The vendees alone appealed to the Divisional Judge, who dismissed the suit on the ground that the thing sold was not immovable property.

According to Section 2, sub-section 5, of the General Clauses Act, 1868, immovable property includes land, benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to the earth. I am inclined to think that water, as long as it is flowing in the bed of a stream or river, is attached to the earth, and is therefore immovable property, though it can be made into movable property by severance or removal from the earth, but the subject matter of the suit is not any particular water, but the right to the use of water. The right to such use is certainly a benefit and it arises out of land, because the water of a perennial stream comes out of land. Even if it came out of the clouds, I should be inclined to hold that the benefit arises out of land, because the water must be first received by the land before it can be beneficially diffused. As plaintiff's superior right was admitted by the vendees, I doubt whether the Courts should have allowed the question to be subsequently raised by a pleader.

From their grounds of appeal to the Divisional Judge, it would appear that the vendees imagined that the first Court had set aside the sale of Wir Khan's share, but such is not the case. They still own his share and, if he wishes to have the sale set aside, he will have to sue them. Plaintiff was contented with the decree for the shares of Ahla and Ali, and on the appeal of the vendees he cannot get a decree for Wir Khan's share.

I accept the appeal and restore the decree of the First Court. Costs of the First Court to be paid as ordered by it. In the Divisional Court and in this Court, Ram Chand and Aya Ram, vendees, will pay plaintiff's costs. I make no order regarding the vendor's costs.

Appeal allowed.

No. 12.

Before Mr. Justice Reid.

APPELLATE SIDE. {

ABDUL RAHIM KHAN,—(PLAINTIFF),—APPELLANT,

*Versus*MUHAMMAD YAR AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

Case No. 566 of 1897.

*Pre-emption—Fraudulent concealment of sale—Limitation Act, 1877,
Section 18, knowledge of facts, presumption as to.*

In a suit for pre-emption it appeared that the deed of sale, which was described in two places in itself as a mortgage deed, was dated 12th December 1876 and was registered on the same date at the *tahsil*, three or four miles from the village in which the land in suit was situate; that the marginal witnesses were residents of villages other than that in which the vendor and vendee resided and where the land was situate; that from 1876 till 1895 the vendee continued to be recorded, as before, as tenant of the said land; that on the 19th September 1894 a measurement clerk reported that a sale had taken place and that the vendee was in possession; that on the 1st October 1895 mutation of names was effected in the vendee's favour by order of the Tahsildar, and that the residents of the village in which the land was situate, as a body, were not aware of the sale. The plaint was filed in February 1896, concealment of the sale being therein alleged, and the pre-emptor, when examined before issues were framed, pleaded fraud by which he had been deceived. The first Court decreed the claim, finding that the fact of the sale became known to plaintiff on the 1st October 1895 and that there had been fraudulent concealment thereof, but the Divisional Judge, on appeal, dismissed the suit as barred by limitation, calculating either from the date of registration or from the 19th September 1894.

Plaintiff appealed to the Chief Court, and in addition to the facts above-mentioned, on which his allegation of fraudulent concealment was based, further urged in support of such allegation the fact that on the death of the vendor in 1881, his son was recorded as owner in his place.

Held, that though each of the facts above set forth, when taken alone, might be merely suspicious, yet when found to concur, they established fraudulent concealment within the meaning of Section 18 of the Limitation Act.

Held, further, that, fraudulent concealment having been established respondent upon whom the *onus* rested, had not proved that the appellant had knowledge of the sale more than one year before suit, which was therefore within time.

Further appeal from the order of R. L. Harris, Esquire, Divisional Judge, Derajat Division, dated 1st April 1897.

Oertel, for appellant.

Parkash Chand, for respondents.

The judgment of the Court was as follows :

REID, J.—The sole question for consideration is whether *4th Feby. 1898.* the suit for pre-emption was or was not time-barred when instituted on the 15th February 1896. The sale-deed in suit is dated 12th December 1876, and was registered on the same date at the *tahsil*, three or four miles from the village in which the land in suit is situate, the two marginal witnesses to the deed being residents of villages a mile and a half and three miles, respectively, according to the respondent from that village.

The sale-deed was described in two places, in itself, as a mortgage-deed, and from 1876 till 1895 the vendee continued to be recorded, as before, as tenant of the land in suit.

In 1894 or 1895—both dates are given in different proceedings—a measurement clerk reported that the vendee was in possession, and on the 1st October 1895 mutation of names was effected in his favour by order of the *Tahsildar*. In the plaint, filed 4½ months after this mutation, concealment of the sale was alleged, and the pre-emptor, when examined before issues were framed, alleged fraud by which he had been deceived.

The Court of first instance decreed the claim, finding that "the fact of the sale became known on the 1st October 1895," and finding that there had been fraudulent concealment of the sale.

From this decree the vendee and other defendants appealed, the sole point raised in appeal being limitation. The lower Appellate Court dismissed the suit, holding that it was barred by limitation, either calculating from the date of registration or from the 19th September 1894, when application for mutation was made by the vendee. It does not appear from the record, and nothing has been pointed out to me by the learned counsel for the respondents to show, that there was any application for mutation by the vendee on the 19th September 1894: that was the date of the report already referred to, which was in these words "a sale having taken place, the vendee has taken possession": on this followed the order of the 1st October 1895.

The facts on which the allegation of fraudulent concealment is based are (1), the marginal witnesses to the deed are not residents of the village in which the land in suit is situate, and in which the vendor and vendee resided; (2)

the vendee remained recorded as a tenant, no mutation in his favour as proprietor being effected; (3) in 1881, when the vendor died, his son Isa was recorded as owner in his place; (4) the deed is described as a mortgage-deed; (5) residents of the village as a body were not aware of the sale. Reliance is placed on an unreported ruling of this Court, Civil Appeal No. 932 of 1894, for the proposition that these facts, which are established, constitute such fraud as would extend the period of limitation. Each of the facts, taken alone, might be merely suspicious, but when found to concur, specially having regard to the nature of the third fact, they establish fraudulent concealment within the meaning of Section 18 of the Limitation Act. The question remains, when the fraud first became known to the appellant. The lower Appellate Court fixes the date of knowledge as the 19th September 1895, possession on that date being presumable, but I am not satisfied that there was then any intimation to the appellant of the sale, which had been till then fraudulently concealed. In *Rahimbhoy Habibbhoy v. Turner, I. L. R., XVII B. (P. C.), 341*, their Lordships of the Privy Council remarked: "Their Lordships consider that when a man has committed a fraud, and has got property thereby, it is for him to show that the person injured by his fraud, and suing to recover the property, has had clear and definite knowledge of those facts, which constitute the fraud, at a time which is too remote to allow him to bring a suit." Fraudulent concealment being established, it has not, in my opinion, been established that the appellant had knowledge more than one year before the suit, which was, therefore, within time. I see no reason for differing from the finding of the Court of first instance, that time ran from the 1st October 1896. The only plea taken in appeal below being limitation, it is unnecessary to remand this case under Section 562 of the Code of Civil Procedure.

I decree the appeal and restore the decree of the Court of first instance, with costs in all Courts.

Appeal allowed.

No. 13.

Before Mr. Justice Chatterji and Mr. Justice Clark.

HAMIRA AND OTHERS,—(DEFENDANTS),—APPELLANTS,

Versus

SUNDAR,—(PLAINTIFF),—RESPONDENT.

} APPELLATE SIDE.

Case No. 792 of 1895.

Custom—Succession—Legitimacy—Chaddar-andazi marriage, proof of.

Plaintiff claimed to succeed to part of the estate of one K., on the ground that he was the legitimate son of K. by one Mussammat R. D., who, he alleged, had been married by *chaddar-andazi* to K. after the death of her former husband, one M. Defendants denied that Mussammat R. D. had ever been married to K., and that plaintiff was K.'s son. It appeared that after the death of M., K. and Mussammat R. D. lived together, and were regarded by the *baradari* as man and wife, and that plaintiff after K.'s death was entered in the revenue records as K.'s son. The parties were residents of the Garshankar *tahsil*, Hoshiarpur District.

Held, that under the circumstances above mentioned it had been sufficiently proved that the ceremony of *chaddar-andazi* had actually been performed, and that, therefore, plaintiff was entitled to succeed as prayed.

Quære—Whether in the said district the ceremony of *chaddar-andazi* is necessary to validate marriage.

Further appeal from the order of C. P. Bird, Esquire, Divisional Judge, Hoshiarpur Division, dated 10th April 1895.

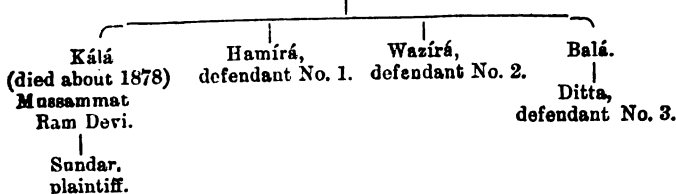
Jaishi Ram, for appellants.

The judgment of the Court was delivered by

CLARK, J.—

DAYA (DIED IN 1884).

7th Feby. 1898.



Plaintiff claims one-fourth of Dayá's estate according to above pedigree table.

Defendants deny that Mussammat Ram Devi was married to Kala, and that Sundar was Kalá's son.

The first Court found that even if Sundar was the son of Kala that there had been no *chaddar-andazi* between Kala and Mussammat Ram Devi, and, therefore, according to the *Riwaj-i-am*, he could not get the inheritance of Kala, and dismissed the suit.

Mr. G. W. Rivaz, Divisional Judge, held that there was not much reason for doubting that plaintiff was the son of Kala; he agreed with the first Court that plaintiff had failed to establish that any *chaddar-andazi* ceremony was gone through between Mussammat Ram Devi and Kala, but held that Mussammat Ram Devi stood in the position of a *karewa* wife to Kala for some years before his death, and that she was regarded as his wife in his village. He wished to ascertain whether the rule was as laid down in the *Riwaj-i-am*, and whether *chaddar-andazi* ceremony was necessary to make the marriage valid, and whether there were any instances of sons being excluded from inheriting because the *chaddar-andazi* ceremony had not been performed. He remanded the case under Section 566, Civil Procedure Code, for a finding on the following issues :—

(1).—Is plaintiff in fact the son of Kala ?

(2).—If so, whether he is his legitimate son for the purpose of inheritance.

The Lower Court amplified these issues into five, of which one was whether *chaddar-andazi* had taken place, and referred the issues to a Local Commissioner.

The return of the Local Commissioner was to the effect that plaintiff was the legitimate son of Kala; that *chaddar-andazi* ceremony had taken place; that if the ceremony had not taken place plaintiff would not inherit by custom. He said there was only one—not well supported—instance of a son having been excluded for want of *chaddar-andazi* ceremony, and that in some cases sons had succeeded where there had been no *chaddar-andazi* ceremony between the parents.

Mr. Bird, Divisional Judge, accepted this report, held plaintiff to be the legitimate son of Kala, and decreed the claim.

Defendants appeal to this Court, and the first question for decision is whether *chaddar-andazi* ceremony took place between Kala and Mussammat Ram Devi. It is clear that the two were regarded as man and wife in the village Soni, where they were living, and in the village Bagra, where defendants live. The villages are only $1\frac{1}{2}$ or 2 *kos* apart. Mussammat Ram Devi's first husband, Makkan Singh, was dead before she began to live with Kala, so there was no obstacle to *chaddar-andazi*. Under these circumstances we do not think that it was necessary for the

ceremony to be very strictly proved, and we do not think the discrepancies pointed out by the first Court in the evidence of the witnesses are sufficient to discredit the witnesses.

They lived together as man and wife, were so treated by the *baradari*, and after Kala's death plaintiff was entered in the revenue records as Kala's son in village Soni.

We think the report of the Local Commissioner should be accepted that *chaddar-andazi* ceremony took place. Even if it did not, we do not think it is made out that the special custom regarding *chaddar-andazi* ceremony to validate marriage is in force in this district. *Punjab Record* No. 33 of 1896 and * No. 1298 of 1895 show that such ceremony is not generally necessary. There is no well-authenticated instance in which a son has been excluded for want of *chaddar-andazi* ceremony between the parents; and there are several instances where a man has taken his *bharjai* into his house without *chaddar-andazi* and the sons have succeeded: this is the allegation for the Garhsbankar *tahsil* that *chaddar-andazi* is generally necessary, but may be dispensed with in the case of a *bharjai*; in the other *tahsils* *chaddar-andazi* is said to be necessary in all cases to validate the marriage.

It is, however, not necessary to come to a decision on this point in the case, as we hold that the *chaddar-andazi* ceremony took place in this case.

We dismiss the appeal with costs.

Appeal dismissed.

No. 14.

Before Mr. Justice Chatterjee and Mr. Justice Clark.

ABDUL KADIR,—(PLAINTIFF),—APPELLANT,

Versus

NUR-UD-DIN AND ANOTHER,—(DEFENDANTS),—
RESPONDENTS.

} APPELLATE SIDE.

CASE No. 35 of 1896.

Landlord and tenant—Right of landlord to claim rent from sub-lessees—Attornment by sub-lessees to stranger claiming title to property—Termination of tenancy—Punjab Tenancy Act, 1887, Section 58.

Held, that upon the determination of a tenancy, it is the duty of the tenant not merely to relinquish possession of the premises, but to restore possession thereof to the landlord, and that if such tenant has underlet the whole or any portion of the premises, he will be liable for a breach of the obligation if his sub-tenant refuses or neglects to give up possession when the term ends.

* Reported as No. 73 P. R. 1897—Ed. P. R.

An attornment made by a tenant or a sub-tenant to a stranger claiming title to the estate of the landlord is absolutely null and void, and the possession of such landlord is in no way affected or changed thereby.

Held further, that there being no privity of contract between the original lessor and a sub-lessee, the former is not entitled to claim rent from the latter, his remedy being only against the lessee with whom he made the contract.

The provision in Section 58 of the Punjab Tenancy Act, 1887, is a special provision in a special enactment, and has no application to the ordinary law of landlord and tenant.

Further appeal from the order of J. A. Anderson, Esquire, Divisional Judge, Delhi Division, dated 10th October 1895.

Madan Gopal, for appellant.

Beechey, for respondents.

The facts of the case fully appear from the following judgment delivered by

11th Feby. 1898.

CLARK, J.—In 1888 plaintiff let the shop in dispute to defendant No. 1 for three years and put him in possession; the lease terminated on the 27th March 1891. On the 11th March 1891 defendant No. 1 renewed the lease for another three years from the 27th March 1891; the lease gave defendant No. 1 the power to sub-let, and he sub-let the shop to defendants Nos. 2 and 3, and let them into possession. When defendants No. 2 and 3 had been in possession for some four days a dispute arose between them and defendant No. 1. Defendant No. 1 under his lease was bound to pay plaintiff the whole three years' rent, Rs. 378, within one month, and he claimed three years' rent in advance from defendants Nos. 2 and 3; they were only willing to pay one year in advance (*vide* plea of defendants Nos. 2 and 3 in the ejectment case brought by plaintiff against them in 1891). While this dispute was going on, Karim Bakhsh, plaintiff's father-in-law, appeared upon the scene, and set up a claim to the shop. He said that plaintiff had given it and other property to his wife, Mussammat Rukia, deceased, that he was part heir of Mussammat Rukia, and that this shop had come to him as his share of her inheritance.

Thereupon defendants Nos. 2 and 3 attorned to Karim Bakhsh, and took a lease of the shop from Karim Bakhsh on 27th March 1891, and remained in possession thereof until the suit was filed on 16th January 1895.

Defendant No. 1 having on hand a dispute with defendants Nos. 2 and 3 about the rent, and seeing that Karim Bakhsh had come in as a claimant, and that defendants Nos. 2 and 3

had attorned to him, says he vacated the shop at the instance of plaintiff.

On 22nd April 1891 plaintiff sued defendants Nos. 2 and 3 for possession of the shop, under Section 9 of the Relief Act. Mr. Clifford held that plaintiff had put in defendant No. 1, and defendant No. 1 had put in defendants Nos. 2 and 3, and that their possession was plaintiff's possession, and that plaintiff could not sue for possession under Section 9 of the Relief Act and dismissed the suit.

On 12th August 1893 plaintiff sued defendant No. 1 for Rs. 378, three years' rent. *Rai Karam Chand*, Judge, Small Cause Court, dismissed the suit on the ground that plaintiff had not maintained defendant No. 1 in possession, as he was bound to under the lease.

On 16th October 1893 *Karim Bakhsh* sued defendants Nos. 2 and 3 for three years' rent, and obtained a decree from the Small Cause Court.

On 15th January 1895 plaintiff sued defendant Nos. 1, 2 and 3 for possession of the shop and rent for three years and eleven months, Rs. 550. The first Court decreed possession of the shop against all defendants, and for Rs. 493 damages for use and occupation against defendants Nos. 2 and 3.

The Divisional Judge reduced the damages to Rs. 10.

Plaintiff appeals and defendants file cross-objections.

The first question we have to ascertain is whether defendants Nos. 2 and 3 were at the time of the suit sub-tenants of plaintiff.

Defendants in their plea in the suit for rent brought against them by *Karim Bakhsh* denied that they were tenants of *Karim Bakhsh*, and pleaded that they were the tenants of defendant No. 1, who was the tenant of defendants Nos. 2 and 3.

Plaintiff certainly put defendant No. 1 in possession of the shop, and defendant No. 1 put defendants Nos. 2 and 3 in possession as sub-tenants; defendants Nos. 2 and 3 were therefore sub-tenants of plaintiff at the time of institution of the suit, unless for any reason the tenancy had terminated.

By the terms of defendant No. 1's lease he could not give up the shop at pleasure; if he lost the shop for any reason he could claim a refund of the rent from plaintiff (clauses 2 and 6 of the lease).

Nothing has been shown that would justify defendant No. 1 in giving up the shop; he had been let into possession by plaintiff and he had let defendants Nos. 2 and 3 into possession; it is not shown that plaintiff agreed to defendant No. 1's giving up the shop, nor that his possession had been seriously attacked.

Defendants Nos. 2 and 3 never lost possession; the fact that they attorned to Karim Bakhsh would not terminate their tenancy.

Under English law such an attornment would be null and void. Foa in his *Law of Landlord and Tenant*, 2nd Edition, 1895, page 355, says that the effect of Statute II George 2, C. 19, S. 11, is—"that all attornments made by tenants to "strangers claiming titles to the estates of their respective land-lords shall be absolutely null and void to all intents and "purposes whatsoever, and the possession of such landlords "not deemed to be in any way affected or changed thereby."

"Mere relinquishment of possession by the tenant.....
".....is not sufficient, there must be acceptance of the
"possession by the landlord."—Foa, page 502.

"The duty of the tenant upon the determination of the
"tenancy in one of the modes already explained is simply to
"yield up peaceable and complete possession of the premises
"devised to him.....This duty will be implied in law
"if not expressed in the contract between the parties, and
"the tenant will not discharge it by merely going out of
"possession unless he restore possession to the landlord.
"It follows that if he has under-let the whole or any portion
"of the premises, he will be liable for a breach of the
"obligation if his sub-tenant refuse or neglect to give up
"possession when the term ends."—(Foa, page 587.)
There was no action on the part of defendants Nos. 2 and 3 which terminated their tenancy from defendant No. 1, nor was there any action on the part of defendant No. 1 which terminated his tenancy from plaintiff. Even if defendants Nos. 2 and 3 had terminated their tenancy from defendant No. 1, this would not have terminated defendant No. 1's tenancy from plaintiff.

We hold then that at the time of the institution of this suit, defendant No. 1 was the tenant of plaintiff, and defendants Nos. 2 and 3 were the tenants of defendant No. 1. Neither had the tenancy of defendants Nos. 2 and 3 under defendant No. 1 nor the tenancy of defendant No. 1 under plaintiff been terminated.

The question then arises whether plaintiff can claim rent from the sub-tenants.

There is no privity of contract between plaintiff and the sub-tenants, and on general principles plaintiff is not entitled to claim rent from the sub-tenants; he must look to his tenant with whom he made the contract.

The authorities are all to the same effect. Williams on Real Property says :—" Every under-lessee becomes tenant to the lessee who grants the under-lease, and not tenant to the original lessor. Between him and the under-lessee no privity is said to exist. Thus the original lessor cannot maintain any action against an under-lessee for any breach of the covenants contained in the original lease. His remedy is only against the lessee " (13th Edition, page 408). Woodfall's Law of Landlord and Tenants, 8th Edition, page 13, says :—" The under-lessee is not liable to the original lessor for the rent and covenants in the original lease."

Foa, page 114, says :—" No action will lie upon a covenant unless there be privity of estate between the parties, hence in the case of an under-lease, the under-lessee cannot be sued in an action for breach of covenant by the original lessor, even though the rent by such under-lease be made payable to the latter."

In answer to this it is argued by plaintiff's counsel that the Indian law is different from the English law, and reliance is placed upon Section 58 of the Punjab Tenancy Act and *XIV W. B.*, 273.

We do not think there is any reason for holding that the principles of the English law on this subject are not the same principles which govern the Indian law.

The provision in the Punjab Tenancy Act, putting the sub-tenant in the same position as regards the landlord as the tenant, is a special provision in a special enactment. The fact of its being specially provided in this case suggests that the general law is different. The *Weekly Reporter* case refers to an assignee, not to a sub-tenant, and is not in point.

We hold then that plaintiff can make no claim for rent against defendants Nos. 2 and 3, sub-tenants; his claim lay against defendant No. 1, his tenant.

Unfortunately for plaintiff his claim against defendant No. 1 is now entirely out of Court. It was dismissed by the Judge of the Small Cause Court in 1893, and has again been

now dismissed by the first Court in this case, and plaintiff has not appealed from that decision.

Holding as we have done that defendants Nos. 2 and 3 are sub-tenants and not assignees or trespassers, it is unnecessary for us to discuss the arguments addressed to us by plaintiff's counsel to show that they were liable to plaintiff as assignees or trespassers.

In the cross-objections by defendants Nos. 2 and 3 it is urged that plaintiffs wrongly filed Court-fees for possession of the shop on the value of Rs. 2,000, whereas they should have been filed only on the value of the tenancy, and that defendants Nos. 2 and 3 cannot, however the case may go, be made to pay excess Court-fees wrongly paid by plaintiff.

I. L. R., XV All., 63, is relied upon to show how the Court-fees should have been calculated.

Without coming to any decision as to what Court-fees should have been paid by plaintiff, we think the matter was so doubtful that plaintiff should not in any case be held responsible for excess Court-fees, because he did not follow the Allahabad ruling.

We dismiss plaintiff's appeal, and accept defendants' cross-objections so far as to dismiss the claim for rent or damages altogether; the result is that only the decree for possession stands.

As regards costs, plaintiff has been seeking diligently and honestly for his just rights from the commencement, though he has not threaded his way successfully through the meshes of the law. Defendants Nos. 2 and 3, on the other hand, have been faithless and dishonest throughout. They appear after having got the shop from defendant No. 1 to have refused to pay him the rent agreed upon; they then entered into an arrangement with Karim Bakhsh to defeat plaintiff's claim. When Karim Bakhsh sued them, they played plaintiff off against him, and now that plaintiffs have sued them, they play Karim Bakhsh off against plaintiffs.

We direct that defendants Nos. 2 and 3 pay plaintiff's costs throughout.

Appeal dismissed in part.

No. 15.

Before Mr. Justice Reid.

NIDHU,—(PLAINTIFF),—APPELLANT,

*Versus*NIHALA AND OTHERS,—(DEFENDANTS)—
RESPONDENTS.

} APPELLATE SIDE.

Case No. 1313 of 1897.

Appeal from order of Appellate Court returning plaint for amendment or for presentation to proper Court—Civil Procedure Code, 1882, Sections 53, 582, 588 (6).

Held, following I. L. R., III All., 456, that an order of an Appellate Court returning a plaint for amendment or for presentation to the proper Court is not appealable under Section 588 (6) of the Civil Procedure Code, that clause being applicable only to orders passed by Courts of first instance.

Further appeal from the order of Captain O. S. Martindale, Divisional Judge, Hoshiarpur Division, dated 31st August 1897.

Jaishi Ram, for appellant.

Madan Gopal, for respondent.

The judgment of the learned Judge was as follows:—

REID, J.—A preliminary objection has been taken by the learned counsel for the respondents that the order appealed from, if it be treated as passed under Sections $\frac{53}{53}$ of the Code of Civil Procedure is not appealable, under Section 588 (6) of the Code, and reliance is placed on *Bindeshri Chaubey v. Nandu*. *I. L. R., III All., 456.*

In that case it was ruled that Section 588 (6) relates to orders returning plaints for amendment, or to be presented to the proper Court, passed by a Court of first instance, and not to a decision of an Appellate Court upon an appeal to it against the judgment of a Court of first instance on general grounds.

For the appellant it is argued that the order must be treated as being under Section 562 of the Code, having regard to the provisions of Section 564. The order is obviously not under Section 562, and *Lingammal v. Ohisma Venkatammal*, *I. L. R., VI Mad., 239*, is authority for holding that a Court of appeal may return a plaint for amendment.

I see no reason to differ from the learned Judges of the Allahabad Court, who ruled that the proper course for the appellants to pursue was to file an appeal from the decree of

the Lower Appellate Court. I dismiss this appeal with costs, and direct that the memorandum of appeal be returned to the appellant to be filed as an appeal from the decree of the Lower Appellate Court upon payment of the requisite Court-fees. Fees for appellant's counsel will be sixteen rupees.

Appeal dismissed.

No. 16.*Before Mr. Justice Reid.***MR. BEVAN PETMAN,—(DECREE-HOLDER),—APPELLANT***Versus***MAJOR H. L. RAMSAY,—(JUDGMENT-DEBTOR),—
RESPONDENT.**} **APPELLATE SIDE.****Case No. 1398 of 1897.**

Sale of share of residential house by one of four Hindu co-sharers—House occupied by tenant—Right of vendee to joint physical possession—Civil Procedure Code, 1882, Section 268.

Appellant purchased from one of four Hindu brothers his share, being one-fourth of a dwelling-house in the Civil Lines, Rawalpindi, which had for some years previously been rented, for residential purposes, by the Political Officer for the time being with *Sardar Ayub Khan*. It appeared that the appellant wished to occupy the whole house, and purchased the share of his vendor, but was unable to come to terms with the three other co-sharers. The respondent, tenant of the house, originally from all the four co-sharers, and finally from three of them, having refused to vacate any part of it, appellant filed a suit against him and his three lessors for "joint possession of one-fourth share of the said house, Rs. 260 arrears of "rent and costs," and on the 19th November 1897 obtained a decree against respondent "for possession of a joint quarter share and for Rs. 60 rent and "for costs." Subsequently appellant applied for execution of the said decree, and prayed that "possession of a one-fourth share of a house "situate in the Civil Lines, in which the judgment-debtor lives, be given." This application having been dismissed on the ground that an order for physical possession, if passed, could not be carried out, having regard to the fact that the respondent was in possession as tenant of a majority of the co-sharers, the decree-holder appealed to the Chief Court.

Held, that appellant having confined his application to physical possession of the house in suit, and having refused to accept possession through receipt of rent, the application had been rightly rejected, on the ground that, the house having been enjoyed by the co-sharers only through receipt of rent, it was not open to one co-sharer to transfer to his vendee the right to interfere with the rights of the other co-sharers in such a manner as to deprive them of the enjoyment of their shares in the joint property.

First appeal from the order of C. L. Dundas, Esquire, District Judge, Rawalpindi, dated 29th November 1897.

Beechey, for appellant.

H. Rattigan, for respondent.

The judgment of the learned Judge was as follows :—

REID, J.—The petitioner purchased from one of four *8th Feby. 1898.* brothers his share, being one-fourth of a dwelling-house in the Civil Lines, Rawalpindi, which had for four or five years been

rented, for residential purposes, by the Political Officer for the time being with *Sardar Ayub Khan*.

From the evidence on the record of the suit, in which the decree of which execution is now sought was passed, it appears that the petitioner wished to occupy the whole house, and purchased the share of his vendor, but was unable to come to terms with the other three co-sharers.

The respondent, tenant of the house, originally from all the co-sharers, and finally from three of them, having refused to vacate any part of it, the appellant filed a suit against him and his three lessors for "joint possession of one-fourth share "of the said house and Rs. 260 arrears of rent, and costs." On the 19th November 1897 the appellant obtained a decree "against defendant No. 1 for possession of a joint quarter share "and for Rs. 60, rent and for costs." From this decree the respondent filed an appeal which is pending in this Court.

The appellant applied for possession, in execution of this decree, and the order now appealed against was passed on the 29th November 1897, dismissing the application and refusing execution on the ground that an order for physical possession, if passed, could not be carried out, having regard to the fact that the respondent was in possession as tenant of a majority of the co-sharers. On the 30th November 1897 the appellant applied "under Section 396 of the Code of Civil Procedure for "the issue of a commission to partition the property in dispute, "on the ground that the respondent refuses to come to any "reasonable compromise, and provision is made in the Code to "meet the difficulty arising in the case."

Notice was issued to show cause on the 15th December why this application should not be granted, and on the 18th December an adjournment was allowed till the 5th January 1898 to enable the majority of the co-sharers to file a suit for pre-emption against the appellant. On the date fixed an order was passed that the application for partition stand over till the pre-emption case, filed in the interval, comes on for hearing. Objections to the application for partition, dated the 4th December, were filed by the respondent.

It was suggested at the hearing by the learned counsel for the respondent that the vendor and his co-sharers were members of a joint Hindu family. Had this been the case, the co-sharers could have set aside the transfer by the vendor instead of filing a suit or pre-emption, and there was no allegation to this effect below. For the purposes of this appeal it

must be assumed that the parties were co-sharers, though not members of a joint Hindu family, no partition by metes and bounds having been effected. The learned counsel for the appellant quotes (1) *Koonwar Bijoy Keshub Roy Bahadur v. Shama Soondures Dossee*, 2 W. R., Misc., 30; (2) *Brohmo Moyee Debia v. Raj Ohunder Roy*, 5 W. R., Misc., 15; (3) *Ranee Shama Soondures Debia v. Jardine, Skinner & Co.*, 7 W. R., 376; (4) *Nundul Lal v. Lloyd*, 22 W. R., 74; (5) *Lloyd v. Mussammatt Bibee Sogra*, 25 W. R., 313; (6) 21, *Punjab Record*, 1867; (7) 31, *Punjab Record*, 1887; (8) *Rajendro Lall Gossami v. Shama Charan Lahori*, I. L. R., V Calc., 188; (9) *Divarka Nath-Rai v. Kali Chundur Rai*, I. L. R., XIII Calc., 75; (10) *Chuni Singh v. Hira Mahata*, IX Calc., L. R. (F. B.), 37; and Section 263 of the Code of Civil Procedure for the proposition that the appellant is entitled to joint physical possession of the house in suit with the respondent, and that, until partition, he is entitled to go into each and every room in the house at his pleasure.

The learned counsel for the respondent relies on (1) *Mohabeer Pershud v. Ramyad Singh*, 20 W. R., 192; (2) *Deendyal Lal v. Jagdip Narain Singh*, I. L. R., III Calc., (P. C.), 198; (3) *Watson and Co. v. Kam Chand Dutt*, I. L. R., XVIII Calc., (P. C.), 10; (4) *Lachmeswar Singh v. Manowar Hossein*, I. L. R., XIX Calc. (P. C.), 253; (5) *Rama Nand Singh v. Gobind Singh*, I. L. R., V All., 384; (6) *Chander Kishore v. Dampat Kishore*, I. L. R., XVI All., 369; (7) *Venkatarama v. Meera Labai*, I. L. R., XIII Mad., 275; (8) *Rangasami v. Krishnayyan*, I. L. R., XIV Mad., 408; (9) *Balkrishna v. Moro*, I. L. R., XXI Bom., 154; (10) *Gurlingopa v. Nandapa*, I. L. R., XXI Bom., 797, and Mayne's *Hindu Law*, Edition 4, Section 329. The authorities relied on for the respondent are nearly all concerned with alienations by members of a joint Hindu family, but principles are laid down which are applicable to the present case. In (2) their Lordships of the Privy Council remarked, "It is sufficient to instance the seizure and sale of a share in a trading partnership at the suit of a separate creditor of one of the partners. The partner could not himself have sold his share, so as to introduce a stranger into the firm without the consent of his co-partners, but the purchaser at the execution sale acquires the interest sold with the right to have the partnership accounts taken in order to ascertain and realise its value." Their Lordships remarked further that this principle might be applied to shares in a joint and undivided Hindu estate, if the

right of the purchaser were limited to that of compelling the partition, which the co-parcener, whose interest be purchased, might have compelled. In (8) this principle was applied by a Division Bench of the Madras Court, which gave the purchaser the money value of the share purchased by him in a house, instead of the share of the house itself. In (7) it was held that the purchaser of a co-parcener's share can take no higher right than his vendor possesses, and that is not a right to a certain share in each particular item of the family property, but a joint right with the other co-parceners to the ownership and enjoyment of each individual item, with an incidental right to obtain a partition of the whole family property, and have his share therein made over to him after due provision for the family debts and liabilities. In (4) their Lordships of the Privy Council referred to (3) as authority for the position that the Courts should be very cautious of interfering with the enjoyment of joint estates as between their co-owners though they will do so in proper cases. Their Lordships held that where joint property is used by one co-sharer consistently with the continuance of the joint ownership and possession, without exclusion of the co-sharers who do not join in the special use, there is no encroachment on the rights of any of them, as regards common enjoyment, so as to give a ground of suit.

In (9) a *dictum* of Westropp, C. J., in *Balaji v. Gopal*, I. L. R., III Bom., 23—"If any one of several tenants in common, joint tenants, or co-parceners, who is not acting by consent of the others as manager of an estate, is to be at liberty to enhance rent or eject tenants at his own particular pleasure, there manifestly would be no safety for tenants, and it would be impossible for them to know how to regulate their conduct or whom to regard as their landlord"—was approved, and it was treated as settled law that a co-sharer who is manager, even with the consent of his co-sharers, cannot maintain a suit by himself and in his own name to eject a tenant, who has failed to comply with a notice calling on him to pay enhanced rent, and in (10) it was held by a Division Bench of the Bombay Court that the purchaser of the interests of a Hindu co-parcener stands in no better position than his vendor.

Of the authorities relied on by the learned counsel for the appellant, in (1) a Bench of the Calcutta Court held, by a majority of four to one (*Kemp, J.*), that an auction purchaser of the share of a joint undivided Hindu property, including

a dwelling-house, was entitled to be put into actual possession of a portion of the house.

In (2) it was held that a co-proprietor in a *taluk* is entitled to partake in the joint possession of all the land held *khas* by the co-sharers, or which would be so held by them if they had not leased it to tenants. The Court declined to decide what the rights of the co-proprietor were in respect of houses built on such land.

In (3) it was held that of so much of a share decreed as was in *khas* possession of co-sharers, physical possession should be given under Section 223, Act VIII of 1859, while of so much as was in possession of tenants formal possession should be given under Section 224 of the Act.

In (4) it was held that, where land is held in joint proprietorship, an action to recover it from a stranger, who is in wrongful possession, must be brought in the name of all the proprietors jointly, and that one shareholder alone, or his assignee, cannot claim to cultivate any portion of the property which is not in his *zerai* without the consent of the other sharers, merely on the ground that he is willing to pay a reasonable rent for it.

In (5) it was held that, though a suit for partition is the best means of settling difficulties between co-sharers who will not agree, every co-sharer in an estate is entitled to joint possession with every other co-sharer, and is entitled to prevent anyone not having a right to occupancy from cultivating any portion of the land contrary to his wishes.

In (6) it was held that the owner of a fourth share in a piece of building land was entitled, as against persons who had built on the land with consent of the proprietors of a half share, to possession of his share on paying compensation to the builders.

In (7) it was held that where a decree for partition failed to specify the actual parcels of land to be assigned to each sharer, such assignment might be effected in execution proceedings.

In (8) it was held that one of several co-proprietors has no right to take exclusive possession of any portion of the co-proprietary land without the consent of the other co-proprietors.

In (9) it was held that where several co-sharers have served a joint notice to quit, upon which notice they jointly institute a suit for recovery of the land, the fact that one of the

plaintiffs withdraws from the suit will not prevent the remaining plaintiffs from obtaining a decree for possession of their shares of the land, and in (10) it was ruled by a majority of three to two that co-sharers who wish to eject a tenant may do so, making co-sharers who decline to join in the suit defendants. The minority held that the remedy was by partition.

The appellant's counsel farther relies on a judgment of this Court in Civil Revision No. 442 of 1895, which is inapplicable, the obstructor not being the judgment-debtor, and the Court holding that Section 335 of the Code of Civil Procedure applied. The owner of one-third of the house, of which two-thirds had been sold in execution of a decree, locked it up and would not allow possession to be taken. The house was not occupied by a tenant, or as far as can be gathered from the record by any one.

The relief sought in the application for execution was as follows :—"That possession of a one-fourth joint share of a "house situate in the Civil Lines, in which the judgment-debtor lives, be given."

Reading the decree and the application for execution together, I see no reason why execution should not have been effected by giving possession through receipt of rent jointly with the other three co-sharers. The decree included an award of rent for two months at the rate of thirty rupees per mensem, the rent payable to each of the co-sharers. In any event it was open to the appellant to apply for amendment of the decree.

On the facts, the authorities quoted and the law applicable, I have arrived at the conclusion that the lower Court was justified in refusing the relief sought at the argument before it, joint physical possession of the house in suit. The house was enjoyed by the co-sharers only through receipt of rent, and one co-sharer could not transfer to his vendee the right to interfere with the rights of the other co-sharers in such a manner as to deprive them of the enjoyment of their shares in the joint property. It is obvious that such enjoyment as was sought by the appellant would very materially reduce the value of the property of his co-sharers, and very possibly have the effect of depriving them of the rent for which the property had been acquired by them or their ancestor. For the appellant it has been argued that, inasmuch as he would be entitled on partition to be put in physical possession of a defined one-fourth part of the house, he is now entitled to joint physical possession of the whole. The rights of the parties on partition are

not now before me, it is sufficient to remark that a Court might possibly award the appellant, or the other co-sharers, the value in money of the share or shares left in possession of a sharer or sharers. It does not necessarily follow that each co-sharer would be put in physical possession. Section 250 of the Code gives a Court discretion to refuse execution and, inasmuch as the applicant in the Court below and in this Court confined his application to physical possession of the house in suit, the suggestion that possession should be through receipt of rent being strenuously opposed by his counsel, the Court below was justified in treating the application before it as being for physical possession only, and in rejecting that application.

The appeal fails and is dismissed with costs.

Appeal dismissed.

No. 17.

Before Mr. Justice Chatterji and Mr. Justice Clark.

TARA SINGH,—(DEFENDANT),—APPELLANT,

Versus

SOHNU SHAH,—(PLAINTIFF),—RESPONDENT.

} APPELLATE SIDE.

Case No. 1099 of 1895.

Contract Act, 1872, Section 52—Reciprocal promises—Written contract—Extraneous consideration.

Plaintiff had a money decree against one L. S., *jagirdar* of Majra, and had possession of the village, the revenue being then payable in kind, by virtue of a *patta* from the said L. S. On the 30th May 1891, the latter granted a lease of his *jagir* rights for twenty years to his son, R. D., and the defendant, T. S., in equal shares, stipulating to receive Rs. 500 a year from them, and they, in their turn, undertaking to pay Rs. 225 annually on account of cesses and the *nazrana* due to Government from the *jagirdar* into the *tahsil*. Of the balance Rs. 275, one-half was to be paid by the lessor to R. D., and out of the other half the defendant, T. S., was to pay Rs. 100 annually to the plaintiff in liquidation of his decree against the lessor, and Rs. 37-8-0 to the lessor himself. On the 31st May 1891 T. S. executed the bond, now sued upon, in favour of plaintiff, whereby he agreed to pay the amount of the plaintiff's decree, which was fixed at Rs. 1,400, in yearly instalments of Rs. 100 each, payable before *Jeth* each *Sambat* year from 1948. In case of default, the whole amount due at the time was to be realizable at once. On the said date plaintiff wrote a document (called a receipt) in favour of T. S. and R. D., by which he declared that he had given up possession of the village which he had been holding under the *jagirdar's* *patta*, and stipulated that he would pay the revenue due on account of the lands held by him, as owner or mortgagee, to them. Plaintiff having sued to recover Rs. 1,250 on the bond upon the allegation that T. S. had paid him Rs. 150 only of the stipulated instalments and had failed to pay the rest, T. S. pleaded that the consideration for the bond, *viz.*, the lease of

his *jagir* by L. S., had failed as it was incapable of enforcement, and that plaintiff by his own conduct, in paying the *jagir* dues to L. S. contrary to his agreement, was precluded from suing on the bond. It was proved that plaintiff had paid the revenue of his lands direct to L. S. since *Rabi* 1892, and not to the lessees as agreed upon, and that T. S. had realized *batai* for *Kharif* 1891. The first Court accepted T. S.'s plea and dismissed the claim so far as it was based on the bond, but the Divisional Judge, on appeal, decreed plaintiff's suit in full on the ground that the bond was an independent contract, the consideration being the release of L. S. from his liability under the decree. T. S. appealed to the Chief Court.

Held, upon the facts as above stated, that the contract between plaintiff and T. S. was contained in the bond and the so-called receipt read together, and not in the bond alone, and that plaintiff's failure to pay the *jagir* dues to T. S. and R. D., as he had agreed to do, was a sufficient ground for T. S. avoiding his contract as contained in the bond.

The consideration for a contract is extraneous to its terms, and there is no legal objection to proof being given that the recital of the consideration in a written contract is incomplete, or is in reality something different.

Further appeal from the order of Rai Bahadur Lala Buta Mal, Divisional Judge, Amritsar Division, dated 19th June 1895.

Duni Chand, for appellant.

Jaishi Ram, for respondent.

The judgment of the Court was delivered by

7th Feby. 1898.

CHATTERJI, J.—The material facts are shortly these. The plaintiff had a money decree against one *Mian Lachman Singh*, *jagirdar* of *Majra*, and had possession of the village, the revenue being then payable in kind, by virtue of a *patta* from *Lachman Singh*. On 30th May 1891 *Lachman Singh* granted a lease of his *jagir* rights for twenty years to his son, *Ram Das*, and the defendant, *Tara Singh*, in equal shares, stipulating to receive Rs. 500 a year from them. The lessees undertook to pay Rs. 225 annually on account of cesses and the *nazrana* due to Government from the *jagirdar* into the *tahsil*. Of the balance, Rs. 275, one-half was to be paid to the lessor by *Ram Das*, and out of the other half the defendant, *Tara Singh*, was to pay Rs. 100 annually to the plaintiff in liquidation of his decree against the lessor, and Rs. 37-8-0 to the lessor himself. On 31st May 1891 *Tara Singh*, clearly in pursuance of this arrangement, executed the bond sued upon in favour of plaintiff, whereby he agreed to pay the amount of the plaintiff's decree, which was fixed at Rs. 1,400, in yearly instalments of Rs. 100 each, payable before *Jeth* each *Sambat* year from 1948. In case of default the whole amount due at the time was to be realizable at once. On the same date the plaintiff wrote a document called a receipt in

favour of the defendant and Ram Das, by which he declared that he had given up possession of the village, which he had been holding under the *jagirdar's patta*, and further stipulated that he would pay the revenue due on account of the lands held by him as owner or mortgagee to them.

Plaintiff has now sued for recovery of Rs. 1,250 on the bond alleging that Tara Singh had paid him only Rs. 150 on account of the stipulated instalments and failed to pay the rest. There is a small claim also on a book account, but it is not in dispute before us.

Defendant's plea is that the consideration for the bond, which was the lease of his *jagir* by Lachman Singh, had failed as it is not capable of enforcement, and that plaintiff, by his own conduct in paying the *jagir* dues to Lachman Singh, contrary to his agreement, is precluded from suing on the bond.

The first Court, the District Judge of Gurdaspur, held that the plaintiff was barred from realizing the amount of the bond, unless he paid the revenue of his lands to the defendant, and dismissed this portion of the claim. The Divisional Judge, however, decreed it, on the ground that the bond was an independent contract, and that the consideration was the release of Lachman Singh from his liability under the decree.

The plaintiff admitted before the District Judge that he had paid the revenue of his lands direct to the *jagirdar* since *Rabi* 1892, though he had agreed to pay it to the lessees. Defendant stated that he had realized *batai* for *Kharif* 1891, and this appears not to have been denied by the plaintiff.

It is unnecessary to go into the question whether the terms of the so-called receipt as regards payment of revenue to the lessees of the *jagir* can be separately enforced. The defendant urges that it is unenforceable, and there was no serious argument on the respondent's part controverting this position. Whatever may be the merits of this question, if the plaintiff's promise formed the consideration for that of the defendant to pay Lachman Singh's debt, the plaintiff's failure to keep it may be a sufficient ground for avoidance of the latter's contract. The point for decision then is whether the parties' respective promises can be said to be mutually so connected.

The bond sued upon makes no reference to payment of revenue by plaintiff to the defendant, but merely stipulates that defendant will pay Lachman Singh's debt in certain instalments. But the receipt also is dated the same day, and the

plaintiff, who was the previous lessee of the *jagir*, surrendered possession by it to the new lessees. The lease to Tara Singh had for its avowed object the liquidation of plaintiff's decree against Lachman Singh. It is beyond doubt that plaintiff knew the contents of the lease, and it cannot be believed as his counsel evidently meant to insinuate by his argument, that plaintiff is a resident of a different village to that leased to defendant, that he had no previous knowledge whatever of the lease, or even that he gave up possession on its being shown to him for the first time when the receipt was drawn up. It is clear that all the documents are intimately connected together, and that they relate substantially to transactions which had all a common purpose, *vis.*, the payment of Lachman Singh's debt to plaintiff. One of these was the lease of the *jagir* to defendant and Ram Das in place of the plaintiff, another the realization by the lessees under the condition of the lease of the revenue payable by the plaintiff to the *jagirdar*, and the third the taking over of Lachman Singh's debt to plaintiff by the defendant. The illustration given by the Divisional Judge for holding the view that the consideration for defendant's promise is the discharge of the original debt, is not in point, for he has made no reference to the plaintiff's contemporaneous promise in writing to pay the revenue to the defendant. The latter promise is the substantial consideration, and no other satisfactory explanation for defendant taking Lachman Singh's liabilities on himself has been advanced. It is probable that the parties acted on the agreement in the receipt before *Rabi* 1892, and this also supports our view. Moreover, it would seem right to hold that the contract between the plaintiff and the defendant is contained in the receipt and the bond, and not in the latter alone.

The consideration for a contract is extraneous to its terms, and there is no legal objection to proof being given that the recital of the consideration in the written contract is incomplete, or that the real consideration was something different: (*Hukam Chand v. Hira Lal*, *I. L. R.*, *III Bom.*, 159; *Vasudeva v. Narasamma*, *I. L. R.*, *V Mad.*, 6 at page 8; *Kumara v. Srinivasa*, *I. L. R.*, *XI Mad.*, 213). Moreover no such objection was urged by counsel before us at the hearing, and the bond itself does not actually recite that the consideration was the mere discharge of Lachman Singh from his liabilities to the plaintiff.

We hold, therefore, that the real consideration for defendant's promise was the plaintiff's promise to pay the revenue of

the lands held by him in Majra to the former and his co-lessee. It is proved that the plaintiff holds more than three-fourths of the village and pays Rs. 335-14-0 as revenue out of a total of Rs. 412, payable to Lachman Singh. The *amount* of revenue payable by the plaintiff is, however, really immaterial for purposes of this case.

Reading the bond and the receipt together, the case appears to us to stand thus—the plaintiff agreed to pay the revenue payable by him to the defendant and his co-lessee, who were to receive it in equal shares, and defendant, in consideration thereof agreed to pay Lachman Singh's debt to plaintiff in annual instalments of Rs. 100 each. The parties made a set of reciprocal promises to each other and, having regard to the circumstances of the case, the fact that the defendant is no relation of Lachman Singh, and that the object of the latter's lease of the *jagir* rights was to induce the defendant to take over the liability to plaintiff on himself, we are of opinion that it was understood that plaintiff's promise was to be fulfilled first. As he has broken his promise the defendant is not bound to perform his, and the penal clause in the case of default cannot take effect, Section 52, Contract Act. The first Court, therefore, was right in dismissing this part of the plaintiff's claim.

We restore the decree of the District Judge with costs in this and in the Divisional Court.

Appeal allowed.

No. 18.

Before Mr. Justice Chatterji and Mr. Justice Clark.

BELI RAM,—(PLAINTIFF),—APPELLANT,

Versus

CHUHA RAM AND ANOTHER,—(DEFENDANTS),—
RESPONDENTS.

} APPELLATE SIDE.

Case No. 113 of 1896.

Mortgagor and mortgagee—Compensation for improvements by mortgagee, Regulation XVII of 1806.

In 1872 plaintiff's father mortgaged a certain house to defendants' father and made over possession thereof to the latter. The mortgage deed provided that the property should be redeemed within one year on payment of Rs. 900 principal and Rs. 7 on account of costs of a suit, the decree in which, in favour of defendants' father, formed the consideration for the mortgage. In default, it was provided that the mortgage should become a sale. The deed made no provision as regards the mortgagee's right to make repairs or improvements. The evidence established

that the house at the time of mortgage was a *kacha* one, and that some seventeen years before suit it actually fell down owing to this cause, and was rebuilt by the mortgagee, without any objection on the part of plaintiff who was living in the neighbourhood, in a more substantial condition. Plaintiff having sued for redemption, defendants pleaded that the mortgage had under the terms of the deed become a sale, and that, in any event, plaintiff could not redeem the property without paying for the improvements effected thereto. The lower Court decided against defendants on both points, and they appealed to the Divisional Court, but only on the ground that they were entitled to compensation. The Divisional Judge found that defendants were entitled to Rs. 429-10-0 as compensation out of the Rs. 1,200 claimed by them. On appeal to the Chief Court, it was

Held, that the mortgagee had a right to re-build the house in order to keep up his security, and in rebuilding it was authorised to make it more substantial, provided the work was done providently and without any unnecessary expense, and that the mortgagee was, therefore, entitled to be recouped for the outlay, which was under the circumstances a reasonable one, to the extent that the mortgagor would derive benefit therefrom.

Found, on the evidence, that the amount decreed by the Divisional Judge as compensation was proper and reasonable.

Further appeal from the order of G. L. Smith, Esquire, Divisional Judge, Mooltan Division, dated 13th December 1895.

Lal Chand, for appellant.

Sham Lal, for respondents.

The judgment of the Court was delivered by

12th Feby. 1898.

CHATTERJI, J.—The facts are given in the judgment of the Court of first instance. The dispute now is about the right of the mortgagee to compensation for improvements. Parties have filed cross appeals, plaintiff contending that the mortgagee is entitled to nothing, and the latter that he has been allowed too little by the Divisional Judge.

There appears to be no dispute that the house has been actually rebuilt by the defendants. The plaintiff says it was unnecessarily rebuilt, but the old structure was mostly if not wholly a *kacha* one, and liable to tumble down in case of heavy rain and required a considerable outlay each time for repairs. It is fairly proved that it fell down owing to this cause some sixteen or seventeen years before the institution of the suit. That being so, the mortgagee had the right to rebuild it in order to keep up his security, and in rebuilding he was authorised to make it more substantial provided the work was "done providently and no new or expensive buildings were erected for purposes different from those for which the former buildings were used," (Fisher on *Mortgages*, 4th Edition, page

865). It is not contended that the reconstruction by the mortgagee is open to any of the above objections, and it is admitted before us that, as a result of the improvement, the rent has increased and is now Rs. 5 a month, the benefit of which will accrue to the mortgagor on redemption. The case is thus more analogous to No. 67, *Punjab Record*, 1893, and distinguishable from No. 67, *Punjab Record*, 1896. We hold that the outlay was a reasonable one, and that the mortgagee is entitled to be recouped for it, at least to the extent the mortgagor will derive benefit from it. Moreover plaintiff was admittedly living at no great distance from the house, and made no objection, which not only precludes him from putting forward his present contention under the circumstances of this case, but clearly shows that the expenditure was reasonable and necessary.

There is considerable force in the Divisional Judge's reasoning, based on No. 123, *Punjab Record*, 1888, that the mortgagee *bonâ fide* believed himself to be the owner, as the time for redemption had expired, and, under the terms of the deed of mortgage, after the lapse of the period fixed, the plaintiff's right of redemption was lost. Regulation XVII of 1806 was declared to be in force in the Punjab by Act IV of 1872, on 28th March 1879, after the execution of the deed, and it was disputed until the doubt was set at rest by No. 117, *Punjab Record*, 1885, that it was applicable to house property. But this discussion need not be carried further, as even as a mortgagee, the defendant is entitled to compensation for an improvement of the character he has made in this case.

As regards the amount of compensation, we do not see sufficient ground for differing from the finding of the Divisional Judge. The defendant evidently claimed too much, while the value of the new structures was differently estimated at Rs. 424 and Rs. 591 by two qualified persons in the Court of first instance, and at Rs. 429-10-0 by the commissioner appointed by the Divisional Judge. The actual outlay incurred by the defendants can only be matter of guess, and it is difficult to come to a valuation of the improvements at the time of suit regarding which there would not be room for some difference of opinion. We think all the circumstances considered, the value allowed by the Divisional Judge is not excessive but proper and reasonable.

We therefore dismiss the appeal and the cross appeal, and leave the parties to bear their own costs in this Court.

Appeal dismissed.

No. 19.

Before Sir Charles Roe, Kt., Chief Judge, and Mr. Justice Stogdon.

APPELLATE SIDE. }

RAMSUKH DAS,—(DEFENDANT),—APPELLANT,

Versus

FAZAL-UD-DIN AND OTHERS,—(PLAINTIFFS AND DEFENDANTS),—RESPONDENTS.

Case No. 776 of 1895.

Pre-emption—Mortgage by conditional sale—Failure by pre-emptors to tender amount due on mortgage after notice, effect of—Plaintiff in pre-emption suit acting banami—Joint suit for pre-emption by numerous occupancy tenants—Price to be paid by pre-emptors on foreclosure of mortgage—Punjab Laws Act, 1872, Sections 13, 14, 15.

Held, that in the case of a foreclosure of mortgage by conditional sale, the failure on the part of the pre-emptor to tender the amount due on the mortgage after notice duly served upon him, does not involve forfeiture of his right of pre-emption, the provision as to forfeiture contained in Section 14 of the Punjab Laws Act, which deals with sales, having been intentionally omitted in Section 15 of the Act, which deals with foreclosures.

Held, further, that, though when it is proved that a plaintiff in a pre-emption suit is acting *banami* the Court should refuse the nominal plaintiff a decree, a plaintiff in such a suit is not disentitled to a decree merely because, in order to raise funds for the maintenance of his suit, he has entered into an agreement with other persons as to what he will do with the land if he gets it, any subsequent transfer of such land by the plaintiff after he has obtained it giving rise to a fresh cause of action to the other pre-emptors.

In a joint suit for pre-emption by several occupancy tenants and others it was objected on appeal that (1) the occupancy tenants had joined strangers in the plaint, (2) that plaintiffs were not the whole body of the occupancy tenants, and (3) that as individual tenants they could not combine their claims in a single suit.

Held, that the said objections were unfounded. If the list of plaintiffs included any persons who were not occupancy tenants, the proper cause was to take the objection at the first hearing and have their names struck out, which could be done without altering the plaint generally or affecting the right of the remaining plaintiffs to claim the whole property. Moreover, as it was not disputed that each occupancy tenant could sue separately for the whole property, or that the whole property would be divided equally among those tenants who succeeded in obtaining a decree, there was no reason why the plaintiffs could not sue jointly, even upon the assumption that they did not represent the whole body of the tenants.

As regards the price to be paid by the pre-emptor, *held*, that he was entitled to take the property on foreclosure on payment, not of what was due on the mortgage, but of the market value only.

The mere fact that a pre-emptor in his eagerness to get the land and to outbid others, had professed himself ready to pay a sum considerably more than the market value, held, not to amount to an estoppel, it being established that such statement did not lead defendant to confess judgment or to do any other act which he would not have done had the statement not been made.

*First appeal from the order of Kazi Muhammad Aslam, O.M.G.,
District Judge, Hissar, dated 11th June 1895.*

Grey and K. P. Roy, for appellant.

Oertel, for respondents.

The facts of the case are fully stated in the judgment of the Court delivered by

ROZ, C. J.—We have before us on appeal or revision five 15th Feb'y. 1898. cases relating to claims to pre-emption in the village of Darbi in the Sirsa *tahsil* of the Hissar District.

That village appears to be held by a body of proprietors, descendants of a common ancestor, on shares, represented by *biswas*, the total being 20 *biswas*, or 1 *bigha*.

In 1889 Jamal, one of the proprietors, sold for Rs. 6,675 out of his shares $3\frac{1}{2}$ *biswas* to Ramsukh Das, but in 1890, no doubt to escape threatened suits for pre-emption, Ramsukh Das sold these $3\frac{1}{2}$ *biswas* to Nihal and other proprietors for Rs. 7,450. On the same date these men executed in his favour a mortgage by conditional sale, to be redeemed in two years, of these $3\frac{1}{2}$ *biswas* and of $1\frac{1}{2}$ *biswas* of their own share, or 5 *biswas* in all for Rs. 8,100, the consideration being the Rs. 7,450 unpaid purchase money, and Rs. 650 said to have been paid in cash.

At the same time Jamal mortgaged 2 *biswas* more to Ramsukh Das on the same terms.

He also in January 1891 mortgaged another 10 *biswas* to Ramsukh Das on the same terms for Rs. 300.

In the mortgages for 5 *biswas* and 2 *biswas* Ramsukh Das issued notices of foreclosure on the mortgagees in December 1892 (applied for on 28th November 1892) and on 4th September 1893 (applied for on 29th August) notices were issued to the pre-emptors under Section 13 of the Punjab Laws Act. On 19th February 1894 two deeds of sale, one for the 5 *biswas* for Rs. 15,000, the amount then due under the terms of the mortgage, and one for the 2 *biswas* for Rs. 5,315, similarly due, were executed by the mortgagors in favour of the mortgagee.

On 7th January 1895 Fazal-ud-din and other occupancy tenants instituted two suits for pre-emption of the 5 and 2

biswas, respectively, sold by the two deeds of 19th February 1894, and on 15th February 1895 two similar suits were instituted by Nazra, one of the proprietors, and a near agnate of the mortgagor-vendors.

The District Judge dismissed both Nazra's suits on the ground that they were collusive, or not brought for his own benefit, and he decreed both the tenants' suits on payment of what he considered to be the market value, *vis.*, Rs. 8,900 for the 5 *biswas* and Rs. 3,560 for the 2 *biswas*.

As regards the 2 *biswas* both Nazra and Ramsukh Das appealed to the Divisional Judge, who decreed Nazra's appeal, and gave him pre-emption on payment of Rs. 3,560, thus dismissing Ramsukh Das' appeal and the tenants' suit.

As regards the 5 *biswas*, first appeals have been filed in this Court by Ramsukh Das and Nazra, and as regards the 2 *biswas* there are further appeals by Ramsukh Das and the tenants.

Jamal's mortgage for 10 *biswas* was foreclosed by Ramsukh Das through the Courts, and on the final decree of the Court, Bala, a proprietor, sued for pre-emption. His suit was decreed by the District Judge on payment of Rs. 692, the amount due under the mortgage, and this decree was upheld by the Divisional Judge. Ramsukh Das has applied to this Court for revision or a further appeal under Section 40 of the Punjab Courts Act, and his petition has been admitted for hearing with the other similar appeals.

The ground of Ramsukh Das' appeal in both cases, regarding the 5 *biswas* and 2 *biswas* against both Nazra and the tenants, is that the transaction of 19th February 1894 was not an independent and fresh sale, but merely the conclusion by mutual agreement, instead of by a formal suit, of the foreclosure proceedings, and that, as in the course of these proceedings, notices had been duly issued to the pre-emptors, and as they failed to tender the amount due on the mortgage, their right to pre-emption was lost. As regards Nazra, there was the further objection that his suits were not *bond fide*, but for the benefit of a third party to whom he had alienated the property claimed in anticipation of a decree, and as regards the tenants there is the further objection (1) that they have joined strangers in the plaint, (2) that the plaintiffs are not the whole body of occupancy tenants, and (3) as individual tenants they cannot combine their claims in a single suit. Finally there is the objection that, if either the tenants or

Nazra are found entitled to a decree, the price stated in the deeds of 19th February 1894 was fixed in good faith, and is, moreover, not in excess of the true market value of the land and this has been admitted by Nazra himself.

As to the first point, we agree with the lower Courts that the transaction of 19th February 1894 was, in fact, as stated by the deeds themselves, a fresh sale. It may be true that, assuming the foreclosure proceedings to have been regular, the mortgagors had lost their title to redeem on 10th December 1893, but something still remained to be done in order to transfer a complete proprietary title to the mortgagee, and the parties elected to do this not by a suit in Court, or by a mere acknowledgment by the mortgagors that their rights were extinguished, but by regular deeds of sale.

But even if we were to regard the deeds of 19th February 1894 as merely finally closing the foreclosure proceedings, we should not be prepared to hold either that the suits were barred by limitation, or that the pre-emptors by not tendering the amount due on receipt of notice had lost their right to pre-emption. As to limitation, as the property sold was a share in joint undivided property, and so incapable, according to many rulings of this Court, of physical possession, limitation would be one year from 19th February 1894.

As to forfeiture of right by non-tender, the first Court has given some strong reasons for holding that the notices were not in fact served, that they were neither served on the pre-emptors individually nor posted on the village gate, or publicly proclaimed. We need not, however, discuss the evidence on this point, for we agree with the contention of the learned counsel for Nazra that, even if the notices were in fact duly served, a failure to tender the amount due on a mortgage would not involve forfeiture of a right of pre-emption. As he points out, there is a great difference both in the circumstances of the case and in the wording of the law as regards notices to pre-emptors in cases of sale and in cases of foreclosure. In the case of a sale the pre-emptor may tender either the price demanded or, if he believes that this was not fixed in good faith, the market value, and by doing so he would acquire an absolute right to take the property offered for sale. Section 14 of the Punjab Laws Act therefore very naturally provides that if he fails to make the tender, he forfeits his right of pre-emption. But in the case of a foreclosure, the pre-emptor has no power to tender the market value, he must

tender the amount due under the mortgage, although his right of pre-emption allows him to demand the property at its market value, even though this may be considerably less than the amount due on the mortgage. Also the tender of even the amount due on the mortgage would give the pre-emptor no absolute right to the property, the mortgagor might himself redeem within the year of grace, for the law (Section 13) distinctly contemplates the issue of notice to pre-emptors at the same time as those to the mortgagors. Even if the mortgagors did not redeem, much would remain to be done by the pre-emptors before they could obtain actual possession. We thus find that the provision as to forfeiture contained in Section 14 (sales) is omitted in Section 15 (foreclosure cases) and we have no doubt that the omission is intentional.

Nazra's right to pre-emption, if his suit is not barred for the reasons just considered, is admittedly superior to that of the tenants, but it is challenged by them, as well as by defendant, Ramsukh Das, on the ground that it is not *bona fide*. The ground for this allegation is that in order to raise the money he was called on by the District Judge to pay into Court, he joined, with others not parties to the suit, some of whom are said not to have any right of pre-emption in mortgaging not only their own land, but the land they expect to get in the present case, to a share in which these strangers were to be admitted. Now there may be authority for holding that when it is proved that a plaintiff in a pre-emption suit is acting *banami*, that is, that another person will, on the plea that he is the real purchaser, be entitled to take from plaintiff whatever may be decreed him, the Court should refuse the nominal plaintiff a decree. But there is no authority for holding that a plaintiff may not enter into any agreement with others as to what he will do with the land if he gets it, and thus raise funds for the maintenance of his suit. In such a case the plaintiff is entitled to his decree, and if after obtaining it he proceeds to transfer the land, a fresh cause of action will arise to other pre-emptors. It would obviously be most inconvenient and improper to try suits for pre-emption, not on the true issues of the case itself, but on side issues raised by pleas of the defendant as to agreements alleged to have been entered into by the plaintiff as to the future disposal of the property.

We thus hold Nazra entitled to a decree for not only the 2 *biswas* but also for the 5 *biswas*. But it is still necessary to

consider the claims of the tenants, for we think that, if it is found that they would be entitled to a decree but for the decree in favour of Nazra, the proper course is not to dismiss their suit entirely, but to give them a conditional decree to take effect only if Nazra fails to execute his decree.

We think that the special objections to the tenants' suit are unfounded. If the list of plaintiff included any persons who were not occupancy tenants, the proper course was to take the objection at the first hearing and have their names struck out. This could be done without altering the plaint generally, or affecting the right of the remaining plaintiff to claim the whole property. Nor, assuming that the plaintiffs do not represent the whole body of the tenants, do we see why they cannot sue jointly. It is not disputed that each occupancy tenant could bring a separate suit for the whole property, or that the whole property would be divided equally amongst those tenants who succeeded in obtaining a decree. To insist that some fifty separate suits should be brought and stamp paid on them, in order to obtain a result, which can be obtained equally well in a single suit, would be opposed to the most ordinary common sense, and could only result in hopeless chaos and the ultimate defeat of the rights of all the pre-emptors. We are, therefore, of opinion that the tenants should also get a decree to be executed only in case Nazra fails to execute his decree.

As regards the price to be paid, there can be no question of good faith. It is perfectly clear that from first to last the action of Ramsukh Das has been an elaborate device to defeat the law of pre-emption, and the terms of the mortgages by conditional sale were arranged, not with a view to the mortgage being redeemed by the mortgagors, but in order to create such a charge on the property that it would be impossible to redeem. We may add, as already pointed out, that, even had the mortgage been entered into in the most perfect good faith, the pre-emptors would have been entitled to take the property on foreclosure on payment, not of what was due under the terms of the mortgage, but of the market value only.

As to what is the true market value, we see no reason for differing from the concurrent findings of the lower Courts. This more than covers the money actually paid by Ramsukh Das, and is more than thirty times the *jama*. As has often been pointed out an average deduced from other sale deeds is of little value, because not only may the quality of the land

be different, but we can never know what part of the price entered in the deeds was really paid. The fact that a canal has come or will soon come to the village may raise the value of the land now, but it could not have raised it much at the time the suits were brought.

It is urged that Nazra had no difficulty in raising Rs. 22,000, but this money was raised, not only on the security of the land in suit, but on other land also.

It is further urged that at any rate Nazra should be made to pay Rs. 15,000 for the 5 *biswas* as he admitted that this was the real value of the land. But Nazra was certainly entitled to take the land at its market value, and in his plaint he distinctly claimed to do so. The fact that in his eagerness to get the land and to outbid the tenants he professed himself ready to pay Rs. 15,000, cannot act as an estoppel, for his statement did not lead defendant to confess judgment, or to do any other act which he would not have done if the statement had not been made.

Our decrees in the appeals before us will therefore be—

(1) as regards the 5 *biswas*—

(a) that the order of the District Judge dismissing Nazra's suit be reversed, and that Nazra be given a decree conditional on his paying into Court, and within three months from this date, if he has not already done so, or if he has withdrawn the money paid in, the sum of Rs. 8,900, less his costs in both Courts, which will be paid by Ramsukh Das, defendant. The tenants will bear their own costs in Nazra's appeal to this Court and in the first Court if they were made parties to his suit. If Nazra fails to pay as above ordered, his suit will stand dismissed with costs throughout;

(b) the appeal of Ramsukh Das against the decree in favour of the tenants be dismissed with costs, as far as he is concerned, but that, as far as Nazra is concerned, the decree of the District Judge in favour of the tenants be so far modified that it be directed that the said decree take effect only in case Nazra fails to execute the decree given him under the preceding order. Should Nazra execute that decree, the plaintiffs' (tenants) suit will stand dis-

missed in the first Court, the parties bearing their own costs in that suit:

(2) as regards the 2 *biswas*—

(1) the appeal of Ramsukh Das is dismissed with costs;

(2) the appeal of the tenants is so far accepted as it is ordered that, if Nazra fails to execute the decree given in his favour by the Divisional Judge, the decree in favour of plaintiff-tenants given by the District Judge be restored with all subsequent costs against Nazra.

As regards the petition for revision in the case of 10 *biswas*, it is sufficient to say that it is clear on the above findings that Ramsukh Das is not, and never was, a real member of the proprietary body, and even if he had been, there can be little doubt that the plaintiff's right would have been superior to his. His petition for revision is dismissed with costs.

No. 20.

Before Sir Charles Roe, Kt., Chief Judge, and Mr. Justice Stogdon.

MRS. E. M. BATES,—(DEFENDANT),—PETITIONER,

Versus

MR. F. PRESTAGE,—(DECEASED,—PLAINTIFF),—
RESPONDENT.

REVISION SIDE

Case No. 2125 of 1897.

Death of sole plaintiff after conclusion of case but before delivery of judgment—Decree drawn up in favour of deceased, plaintiff—Material irregularity—Civil Procedure Code, 1882, Sections 365, 366.

In a certain case after evidence had been taken and arguments heard on the 28th and 29th September 1897, the District Judge on the 2nd November 1897 gave the (sole) plaintiff a decree for the property claimed, and at the foot of his judgment recorded the following note:—
“It having been brought to my knowledge that plaintiff has died in the interim, I deliver judgment notwithstanding, being guided by “I. L. R., XXI, Bom., 314, and the authorities quoted therein, defendant's “counsel agreeing.” Defendant applied to the Chief Court on the Revision Side to set aside the said decree.

Held, that under the circumstances of the present case, there had been a disregard of the provisions of the Civil Procedure which had materially prejudiced the defendant, inasmuch as she could not appeal against a dead person, and had no right of appeal against his heirs who were not on the record, and was moreover deprived of the possibility of the

suit being allowed to abate in consequence of no application under Section 365, Civil Procedure Code, being made within the time allowed by law.

Held, therefore, that the decree of the District Court must be set aside and the case remanded for disposal in accordance with law with reference to Sections 365 and 366 of the Code.

ROX, C. J.—A decree passed in favour of, or against, a dead person is not *ipso facto* a nullity, and all that can be said in such a case is that there has been a disregard of the provisions of the Civil Procedure Code. Each case must be decided on its merits, and the decree should be set aside or maintained, as if the death occurred after decree, according as the disregard of procedure has or has not materially prejudiced the parties.

I. L. R., XXI Bom., 314; I. L. R., VI Mad., 180; I. L. R., XV Mad., 399; I. L. R., XVII All., 478; No. 31, Punjab Record, 1886; No. 7, Punjab Record, 1889; and No. 78, Punjab Record, 1891, referred to.

Petition for revision of the order of Captain O. P. Egerton, District Judge, Simla, dated 2nd November 1897.

H. A. B. Rattigan, for petitioner.

The following judgments were delivered by the learned Judges:—

15th Feb'y. 1898.

STODDON, J.—Mr. Prestage obtained a decree against Mr. Wallace for possession of a bungalow and 12½ acres of land in Kotgarh. In execution he was resisted by Mrs. Bates claiming to be in possession on her own account. Her claim was, therefore, under Section 331, Civil Procedure Code, numbered and registered as a suit between Mr. Prestage, the decree-holder, as plaintiff, and Mrs. Bates, the claimant, as defendant. Evidence was taken and arguments were heard on the 28th and 29th September 1897, on which latter date judgment was postponed. On the 2nd November 1897 the Court gave Mr. Prestage a decree for the property claimed, and at the foot of its judgment recorded the following note:—"It 'having been brought to my knowledge that plaintiff has 'died in the *interim*, I deliver judgment notwithstanding, 'being guided by *I. L. R., XXI Bom., 314*, and the authorities 'quoted therein, defendant's counsel agreeing."

Defendant has applied to this Court to revise the decree of the District Court. She has adopted this course in preference to appealing to the Divisional Judge, because it has been held in No. 7, *Punjab Record*, 1889, that a decree passed by inadvertence against, or in favour of, a dead party is a nullity, from which no appeal lies. In No. 31, *Punjab Record*, 1886, the representative of a respondent in the lower Appellate Court who had died, and against whom a decree was passed

notwithstanding his death, was not allowed to appeal to this Court. No. 78, *Punjab Record*, 1891, is also to a similar effect.

Rama Charya and others, Appellants v. Ananta Charya and others, Respondents, I. L. R., XXI Bom., 314, is similar to the present case, in that the death occurred in the *interim* between the conclusion of the argument and the delivery of judgment, but there is this difference that in *Ram Charya's* case one of the defendants died, while in the present case it is the sole plaintiff who has died. The learned Judges of the Bombay Court in their judgment adverted to the practice of the English Courts, permitting judgment to be entered *nunc pro tunc*, where the signing of them has been delayed by the act of the Court, and noted that such practice was now confirmed by order XVII R, 3 of the High Court of Justice. They did not, however, commit themselves absolutely to the acceptance of the *nunc pro tunc* rule, but observed that as there was no question of principle involved, they ought to follow the ruling in *Narna v. Manager Parambhatta* and to consider the drawing up of the decree as at the utmost merely irregular. They further remarked that the legal representatives of the deceased defendant had not pointed out that they had been in any way prejudiced.

In my opinion the action of the District Judge in passing a decree in favour of a person whom he knew to be dead was irregular. He should have adjourned the delivery of judgment in order to enable the legal representative of the deceased plaintiff to apply under Section 365, Civil Procedure Code, to have his name entered on the record in the place of the deceased plaintiff. We are not obliged to interfere in all cases of irregularity, and *Rama Charya's* case is one in which an irregularity was half admitted, but held to be immaterial. In that case the Court of first instance passed a decree awarding a portion of the plaintiff's claim. The plaintiffs appealed to the High Court. Arguments were heard on the 23rd and 30th November 1892. Defendant No. 1 died on the 12th June 1893, and the appeal was dismissed on the 6th July 1893. The defendants had accepted the decree of the first Court and were bound by it, and as the High Court merely confirmed that decree, the legal representatives of defendant No. 1 could not possibly have been prejudiced by the omission to bring them on the record. As remarked by the learned Judge they had no merits whatever. Had they had any, it is very possible that their objection would have been entertained. I do not therefore think that there is any real conflict between

the decision of the Bombay Court and those of this Court, and *Ramasami Ayyangar v. Bagirathi Ammal*, I. L. R., VI Mad., 180 ; *Krishnayya v. Unnissa Begam*, I. L. R., XV Mad., 399, and *Imdad Ali v. Jagan Lal*, I. L. R., XVII All., 478 at 482. Each case must be disposed of on its own merits. In the present case the irregularity appears to be material. Defendant cannot appeal against a dead person, and she has no right of appeal against his heirs, who are not on the record. Moreover, it is very possible that, if the delivery of judgment had been adjourned, no application under Section 365, Civil Procedure Code, would have been made within the time limited by law, and the suit would have consequently abated. Such being the case, I would set aside the decree of the District Judge and remand the case to him for disposal in accordance with law with reference to Sections 365 and 366, Civil Procedure Code.

16th Feby. 1898.

ROE, C. J.—I am prepared to concur in the order proposed. I do not think, as some of the earlier decisions of this Court seem to imply, that a decree passed in favour of, or against, a dead person, is *ipso facto* a nullity. All that can be said is that there has been a disregard of the provisions of the Procedure Code and, in my opinion, the decree should be set aside or maintained, as if the death occurred after decree, according as the disregard of procedure has, or has not, materially prejudiced the parties.

Each case must be decided on its merits. Ordinarily if a death occurs before the trial, that is the taking of evidence and hearing of argument, is concluded, the omission to bring on the record the legal representatives of a deceased party must prejudice them, as it deprives them of an opportunity of being heard. If the death occurs after argument has been concluded and the case has been adjourned for the delivery of judgment only, then, as my learned colleague observes, there is a difference between the case of the death of a respondent or defendant and that of a plaintiff or appellant.

The omission to bring on the record the legal representative of a deceased respondent or defendant, could injure no one. If brought on, they could not be heard, they would only appear to hear judgment. And had the death occurred immediately after delivery of judgment, the decree could have been executed against them without further proceedings. On the other hand, when the death is that of a plaintiff or appellant, the defendant or respondent must obviously be prejudiced by the

disregard of procedure, he is deprived of his chance of the suit or appeal abating, and at the very least he must be put to the trouble and expense of finding out the legal representatives and bringing them on the record. Thus in the present case the learned counsel for the defendant says that, as far as he can ascertain, the deceased plaintiff has left no legal representative in India, and his legal representative is believed to be a widow residing in England, address unknown. There was thus a very great probability of the suit being allowed to abate, and it is certain that very great trouble and expense would be caused to defendant, if she had to take the necessary steps for discovering the legal representatives of the deceased plaintiff and bring them on the record for purposes of appeal. I do not think the note by the Court of the consent of defendant's counsel to delivery of judgment, which was probably given without a full knowledge of the difficulty of finding the legal representative of the deceased plaintiff, deprives the defendant of her right to apply to this Court for the relief to which, but for that consent, she would otherwise be entitled.

I would only remark in conclusion that I understand the Bombay ruling referred to in these proceedings as in no way implying that the *nunc pro tunc* principle of the English Courts applies to the Indian Courts, to the extent of allowing them to disregard the provisions of the Procedure Code, or of giving to their decrees a date other than what the Code distinctly says they must bear. The English practice is, I think, referred to only to show that there would be no violation of fundamental principles in treating a death, occurring in the interval between the closing of the hearing and the delivery of judgment, as if it had occurred after judgment. Having thus decided that the decree is not *ipso facto* a nullity, the Court proceeded to consider the merits of the particular case, and this is the course I have followed in this case.

Application allowed.

Full Bench.**No. 21.**

*Before Sir Charles Roe, Kt., Chief Judge, Mr. Justice
Frizelle and Mr. Justice Reid.*

REVISION SIDE. {

**NARAIN DAS AND ANOTHER,—(PLAINTIFFS),—
PETITIONERS,**

Versus

**MANOHAR LAL AND OTHERS,—DEFENDANTS,—
RESPONDENTS.**

Case No. 1052 of 1897.

*Civil Procedure Code, 1862, Sections 520, 521, 522, 523, 525, 622—Power
of Court to inquire into objection denying validity of a reference to arbitra-
tion—Revision—Practice.*

Held, by the Full Bench, that it is not competent to a Court, upon an
application, under Section 525 of the Civil Procedure Code, to file an award,
to inquire into and decide objections other than those specified in Sections
520 and 521 of the Code.

It is not the invariable, though it is the usual, practice for a High
Court to refuse to interfere, under Section 622 of the Code, when the party
professing to be injured has another remedy open to him.

No. 134, *Punjab Record*, 1888, and No. 49, *Punjab Record*, 1893, over-
ruled.

*Petition for revision of the order of Pandit Hari Kishen Kaul,
District Judge, Lahore, dated 20th May 1897.*

K. P. Roy, for petitioner.

Madan Gopal, Robinson and Jaishi Ram, for respondents.

The judgments of the learned Judges, who comprised the
Full Bench, were as follows :—

16th March 1898.

ROE, C. J.—In this case an application was made to the
District Judge of Lahore to file an award under Section 525,
Civil Procedure Code, the causes shown against filing it were
objections which went to the root of the award, by denying
the validity of the reference. The District Judge considered
these objections as not falling under Sections 520, 521, Civil
Procedure Code, and he therefore declined to go into them
on the merits, and he rejected the application under Section
525, Civil Procedure Code, directing the petitioners to seek to
enforce their award by a regular suit.

The Court has been asked to revise the order of the Dis-
trict Judge, under Section 622, Civil Procedure Code, on the
ground that the District Judge had jurisdiction to consider the

objections and dispose of them, and as the question, whether he had or had not this jurisdiction, is one on which the decisions of the High Courts and of this Court are conflicting, and is also one of great importance and frequent recurrence, the case has been referred to a Full Bench.

There can be no question that if the District Judge had jurisdiction to consider the objections, his order refusing to do so and dismissing the application is open to revision, under Section 622, Civil Procedure Code. It was urged, as a preliminary objection, that as the petitioners admittedly had another remedy open to them, *viz.*, a regular suit, the Court should follow the invariable practice of all the High Courts, and, as a matter of discretion, refuse to exercise its powers under Section 622.

No doubt it is the usual and proper course for a High Court to refuse to interfere, under Section 622, Civil Procedure Code, when the party professing to be injured has another remedy. But it cannot be said to be invariably the practice, and it is in fact by the exercise of their powers under Section 622, that the High Courts and this Court have delivered their judgments on the point before us. Of our power to consider the present application under Section 622 there can be no question, and, for the reasons already stated, we have considered it expedient to exercise that power.

The learned counsel for the petitioners puts the case briefly thus:—Although Section 525, Civil Procedure Code, makes no provision for the hearing of any objections other than such as are contained in Sections 520, 521, Civil Procedure Code, yet it is necessarily the duty of a Civil Court to decide all objections that are raised before it, and unless it had power to deal with all objections to applications under Section 525, Civil Procedure Code, it would be in the power of any one by putting forward an objection not falling under Sections 520, 521, Civil Procedure Code, however unfounded it may be, to render that section practically inoperative. This was the view taken by the Allahabad ruling in the Full Bench decision reported at page 21, *I. L. R.*, XVII All., and followed in *I. L. R.*, XX Mad., page 89. It is also urged that the opinion of the learned Chief Justice of the Allahabad High Court, expressed in the judgment above mentioned, that, if the general view taken in that judgment is not accepted, it may still be held that an objection that there has been no legal reference to arbitration, is one falling under Section 520, Civil Procedure Code, is correct.

As regards the opposite view taken by the Calcutta High Court Full Bench *I. L. R.*, *XXI Cal.*, page 213, and by the Bombay High Court in *I. L. R.*, *XX Bom.*, page 596, it is pointed out that the question really referred to the Full Bench of the Calcutta Court was whether objections, which did fall under Sections 520 or 521, Civil Procedure Code, could be gone into, and that this was the point decided. The further opinion that objections not falling under Sections 520, 521 could not be gone into was a mere *obiter dictum* of three Judges, on which the other two Judges forming the Full Bench expressed no opinion, in fact one of the two expressly reserved his opinion.

As regards the Bombay High Court, it is argued that the judgments show that the Judges would have followed the Calcutta ruling, had they not felt bound by previous decisions of their own Court.

The two published rulings of this Court (*Punjab Record*, Nos. 134 of 1888 and 49 of 1893) are in accordance with the view taken by the Allahabad and Madras Courts, and it is contended that the unpublished ruling of a single Judge, Mr. H. T. Rivaz, in Chambers, in C. M. No. 255 of 1894, which accepted the Calcutta and Bombay rulings as settling the law, should not be upheld.

After a full consideration of the whole subject, I think that it should be upheld. I am quite unable to accept the view taken by the High Court of Allahabad, that an objection that there has been no valid reference or no valid award can be brought under Section 520, as an objection that the arbitrators have decided what has not been referred to them, because nothing was in fact referred; and there were no arbitrators. The meaning of Section 520 appears to me perfectly plain. It assumes that there has been a valid reference and a valid award, and a perusal of the order of reference and of the award will enable the Court to ascertain at once whether the award has omitted to decide anything referred, or has decided more than was referred. If it has done either of these two things, then the error is rectified by returning the award for completion by adding a further decision on the points left undecided, or by striking out the decision on points not referred to arbitration. To construe Section 520 as authorising the Court to enquire into and decide complicated questions of law and fact, appears to me opposed both to the plain words of the section itself, and to the whole spirit of the arbitration proceedings. That spirit, I understand, to be this—

given the fact that there has been a reference to arbitration and an award, that award shall be final, unless there has been misconduct on the part of the arbitrators. Whether the award falls short of, or exceeds, the reference, can be seen at once by the Court and remedied under Section 520; whether there has or has not been misconduct on the part of the arbitrators is a simple question of fact, which the Court should be able to decide without difficulty. Accordingly the legislature provides that when the Court has decided that there has been no misconduct it shall go on to pass judgment in accordance with the award, and this judgment shall be final.

A similar train of reasoning leads me to reject the view that all objections, not coming under Sections 520 and 521, raised to an application under Section 525, Civil Procedure Code, must be inquired into and disposed of by the Court *ex necessitate rei*. In the first place we have the words of the section itself, which appear to me clearly to limit the objections that can be put forward to those falling under Sections 520, 521. If the legislature had intended that any objection of any kind might be raised, and, if raised, must be inquired into and decided, it would probably have made some provision for this inquiry and decision, but it at any rate would not have worded the section as it stands.

The general power of a Civil Court to decide all questions raised before it appears to me to be inapplicable for another reason. The object of Sections 523 to 526, Civil Procedure Code, is to bring the parties by a short cut and a cheap method to a stage of a case which is ordinarily reached only after the institution of a suit. If a suit were instituted, not to enforce an award, but to enforce an ordinary claim, and the parties agree to arbitration, they must all join in a written application to this effect, (Section 506, Civil Procedure Code). It is quite clear that if, at any stage of the suit, one party alleged and another denied that during the progress of the suit an agreement to refer had been made, the Court would have no power to inquire into the point; and if it found that there had in fact been an agreement make an order of reference. Section 526 provides that when an application under Sections 523 or 525, or an order for reference to arbitration, or for the filing of an award, is made, the same consequences shall follow as would have followed if the order had been made at any stage of a suit. It seems to me impossible to hold that a Court, dealing with applications

under Sections 523 and 525, can exercise a power of enquiry and decision, which it could not have exercised in the course of a suit. The judgment of the Allahabad High Court concludes with the remark that, if the Court gave judgment in accordance with an award, after deciding disputed questions of law or fact regarding the reference or the making of the award, an appeal would lie against its decree. With great deference to the learned Judges who took this view, I must confess that I can see no reason whatever for it. In the Full Bench ruling of this Court, *Punjab Record*, No. 74 of 1894, it was held that, when any such objections are raised regarding arbitration proceedings in the course of an ordinary suit, the judgment is none the less a judgment following an award, and is not open to appeal. And, as already noted, by Section 526 a judgment following an award filed under Section 525, or obtained by a reference under Section 523, stands on precisely the same footing. The proceedings of the Court may disclose such a material irregularity as would justify revision under Section 622, Civil Procedure Code. But assuming that there has been no material irregularity, that the Court has understood the objections raised, taken evidence, where necessary, and decided them, I fail to see how its decision, however erroneous, can be questioned by appeal. The Code provides no appeal against the decision as an interlocutory order, and, as already stated, the judgment itself following the award is final.

The argument that it is open to any party by raising an objection not falling under Sections 520 and 521, Civil Procedure Code, and however unfounded it may be, to render the provisions of Sections 523—525 inoperative, has not, I think, much force. It is admitted that if an application under Section 523 or 525 is rejected, the person making it has still his remedy by a regular suit, and the result of driving him to such a suit by frivolous or unfounded objections would be that the objector would ultimately have to pay the costs.

If such a suit were brought the final judgment, if it followed the award, would, in my opinion, still be open to an appeal, for the finality given to judgments following awards applies only to cases where the awards have been made under the special provisions of the Procedure Code. Both the person seeking to enforce, and the person objecting to, an award would thus stand on an equal footing.

But if the other view be held, that the Court to which application is made under Sections 523 or 525 has jurisdiction

to enquire into and decide objections going to the root of the reference or award, then there would be a most glaring inequality in the position of the parties. If the objections were admitted, the petitioners, under Sections 523 or 525, would still have their remedy by a regular suit, but if they were decided against the objectors, the latter would have no remedy at all.

For the above reasons I would hold that the District Judge rightly refused to deal with the objections taken before him, and I would reject the present application.

FRIZELLE, J.—I agree with the learned Chief Judge. I do not see how the Court could adjudicate on any objections except those mentioned in Section 526. There is nothing in Sections 525 or 526 that allows it to do so, and I think it was the intention of the law that it could not.

REID, J.—For the reasons given by the learned Chief Judge, I concur in holding that the lower Court did not fail to exercise jurisdiction vested in it.

The applications were finally disposed of by the following order :—

ROE, C. J.—In accordance with the above judgment the application in both the cases before us is dismissed, but as the point decided against the petitioners is one on which the High Courts are equally divided, and the published judgments of this Court are in their favour, we direct that the parties pay their own costs in this and in the lower Court.

Application dismissed.

No. 22.

Before Sir Charles Roe, Kt., Chief Judge, and Mr. Justice Frizelle.

JOWALA SINGH,—(DEFENDANT),—APPELLANT,

Versus

KALA SINGH,—(PLAINTIFF),—RESPONDENT.

} APPELLATE SIDE.

Case No. 1349 of 1895.

Occupancy rights, succession to—Adopted son—Punjab Tenancy Act, 1887, Sections 5, 59—Plea raised in Appellate Court for the first time.

Held, that a daughter's son, who has been adopted, is not entitled, by virtue of clause (3) of Section 5 of the Punjab Tenancy Act, to succeed to the occupancy rights of his adoptive father who was a tenant under the said section, and that the objection to such succession can be taken by the male collaterals of the tenant as well as by the landlord.

The proviso in clause (3) of Section 5 of the Act refers only to the original acquisition of the right.

An Appellate Court is entitled to take notice of a question of law which clearly arises in the case, even though the question may have been overlooked both by the parties to the case and by the Courts which have dealt with it.

Further appeal from the order of Colonel C. H. T. Marshall, Divisional Judge, Lahore Division, dated 23rd April 1895.

Parkash Chand, for appellant.

The judgment of the Court was delivered by

17th Decr. 1897.

ROE, C. J.—In this case the plaintiff sued for possession of the land left by Gharibu, an occupancy tenant, under Section 5, clause not given, of the Punjab Tenancy Act, on the ground that plaintiff was the daughter's son of Gharibu and had been adopted by him in early years. His suit was against all the male collaterals of Gharibu, but the defence was conducted by one of them, Jowala Singh only, who appears to be the person in actual possession. His plea was a denial that plaintiff was in fact adopted, and an allegation that even if the adoption did in fact take place it was invalid by custom.

Both the lower Courts have found both these points against defendant, and he appeals to this Court urging both his former pleas and the further objections which he also took in the Divisional Court, that plaintiff cannot succeed under Section 59 of the Tenancy Act.

We should not be prepared to come to a finding on the question of custom without a further enquiry, but it is unnecessary to consider the point until the plea put forward on the basis of the Tenancy Act is decided.

We do not think that we can refuse to consider the plea simply because it was not put forward by defendant in the first Court. It is not a plea involving any fact within the knowledge of defendant, which he could be expected to put forward without legal assistance, and when he obtained that assistance he did put it forward. It is also to be noted that when he pleaded to the suit the Full Bench ruling of this Court published as *Punjab Record*, No. 43 of 1895, had not been delivered, and in any case we are not prepared to say that an Appellate Court should not take notice of a question of law which clearly arises in the case even though the question may have been overlooked both by the parties to the case and by the Courts which have dealt with it.

This being the case we are clearly of opinion that the Full Bench Ruling referred to is fatal to plaintiff's claim. The only point left open to further consideration in that case is whether, if a formal adoption under Hindu Law is proved as a fact, the adopted son might not be regarded as a real son. Such a point cannot arise in the present case for the plaintiff, a daughter's son could not be adopted under Hindu Law.

The fact that Gharibu was a tenant under Section 5 of the Tenancy Act does not alter the case. The particular clause of that section under which he obtained his right is not stated, but even supposing him to have been a tenant under clauses (1), (2), the proviso in clause (3) that the words in the former clause denoting natural relationship include relationship by customary adoption clearly refer only to the original acquisition of the right. The provision is that a tenant, to acquire rights under Section 5 (1), (2), must at the time of the commencement of this Act for more than two generations in the male line of descent have fulfilled certain conditions, and no right of occupancy under that section can be acquired by a fulfilment of its conditions subsequently to the passing of the Act. It is impossible to hold that any right of succession to a tenant under Section 5 (1), (2) is given by clause (3) of the section. Nor can it be contended that the objection now under consideration can be entertained only when put forward by a landlord. A male lineal descendant in the male line succeeds under Section 59 in preference to the landlord, and if the latter can exclude an adopted son, *a fortiori* the former can do so.

We must, therefore, accept this appeal, and reversing the decisions of the lower Courts, direct that plaintiff's claim be dismissed. But under the circumstances of the case we direct that the parties pay their own costs throughout.

Appeal allowed.

No. 23.

Before Mr. Justice Chatterji.

REVISION SIDE. {

KAHAN CHAND,—(DEFENDANT),—PETITIONER,

Versus

MUSSAMMAT INDAR KAUR,—(PLAINTIFF),—
RESPONDENT.

Case No. 324 of 1897.

Small Cause Court Act, 1887, Section 25—Second application for revision after rejection of first application—Civil Procedure Code, 1882, Sections 622, 623 (b).

Held, that there is nothing in the Civil Procedure Code or in the Small Cause Courts Act, 1887, to prevent the Court entertaining a fresh petition under Section 25 of the latter Act after dismissal of a previous petition under the same section.

Held, further, that even if the former order on the previous petition could be held to be a bar to the Court entertaining the subsequent petition, the latter could, and ought to, be treated as one for review of judgment, falling under clause (b) of Section 623 of the Civil Procedure Code, which is wide enough to include unappealable orders of the Court hearing the application, whatever may be the *status* of the Court.

The Court has inherent power to remedy injustice by a reconsideration of an order passed by it, unless precluded by a rule of procedure or practice.

Petition for revision of the order of Khan Bahadur Sheikh Khuda Bakhsh, Judge, Small Cause Court, Lahore, dated 23rd December 1896.

W. H. Rattigan, Q. C., and Herbert, for petitioner.

K. P. Roy and Fazl Din, for respondent.

The judgment of the learned Judge was as follows:—

28th Jany. 1898.

CHATTERJI, J.—As regards the objection that this application does not lie as a second application for revision of the decree of the Small Cause Court, I am of opinion that it does lie. The previous order was given after issuing notice, but it threw out the former application and declined to exercise the Court's revisional jurisdiction. There is nothing in the Code or in the Provincial Small Cause Courts Act to prevent my entertaining a fresh petition, and the practice of the Court, so far as I have been able to ascertain it, is in favour of this view. So far back as 1885 it was sanctioned by a Committee of three Judges in respect of applications under Section 622, Civil Procedure Code, and the same principles apply to those under Section 25 of the

Provincial Small Cause Courts Act. I have myself entertained second applications of this nature occasionally, and I am informed by Mr. Justice Stogdon that he recollects an instance of this kind before himself.

I am also disposed to think that if the former order can be held to be a bar to my coming to a different decision, the present application can and ought to be treated as one for review of judgment, falling under the purview of clause (b) of Section 623, Civil Procedure Code, which is wide enough to include unappealable orders of the Court hearing the application, whatever may be the *status* of the Court.

Further I have inherent power to remedy injustice by a reconsideration of my order, unless precluded by a rule of procedure or practice.

The preliminary objection is therefore over-ruled.

I have gone through the record again, and considered the arguments of counsel. I admitted this application in the hope that an amicable settlement might be arrived at between the parties, as the case is one between mother and son. This hope has not been fulfilled, and both parties are said to be equally to blame.

Under the circumstances I must again dispose of the application in the exercise of my powers under Section 25 of the Provincial Small Cause Courts Act. The petitioner's contention is based on certain legal errors committed by the Judge below. He first held the entry in the plaintiff's book to be a promissory note, and inadmissible for want of sufficient stamp, and returned the plaint for amendment. A substantially identical plaint was subsequently filed, and an objection to this effect by the defendant was over-ruled by the Judge. He then decreed the claim, believing the oral evidence as to the original advance of Rs. 1,300 by plaintiff to defendant, the payment of Rs. 200 by the latter, and his agreement to liquidate the balance in daily payments of annas 8. The oral evidence on the last point clearly refers to the transaction that was entered in the book, which has been held to be inadmissible in evidence. In effect therefore the Judge has either gone back from his opinion that the book entry was not receivable in evidence as a promissory note, or admitted oral evidence of a transaction which has been reduced to writing in contravention of the provisions of Section 91 of the Evidence Act. This is the substance of the argument of petitioner's counsel, and it is further contended that the defendant is

seriously prejudiced by a finding of the Judge in respect of a matter which he had no jurisdiction to decide, *viz.*, that Rs. 1,100 are due to the plaintiff, and that the plaintiff would go on filing fresh suits in this manner, and the present decision would make his defence *res judicata* in future.

The legal errors of the Judge were known to me when I passed the previous orders, and they are hinted at in the judgment. I nevertheless exercised my discretion, and declined to interfere, because I believed with the Judge that the plaintiff had a just claim, and had advanced a large sum of money, Rs. 1,300, to the defendant, and had been repaid only a small fraction. After giving every weight to the arguments of the learned counsel for the defendant I am unable to see that my discretion was wrongly or improperly exercised. The use of my powers under Section 25 should be subservient to the ends of justice and not to defeat them, and it is for this reason that their exercise is not compulsory, but subject to my discretion. Now, I fully concur with the view of the Judge on the merits of the case. The plaintiff's father and other reliable witnesses depose to the original loan, which is supported by the plaintiff's possession of the *kundi*, which her money is said to have enabled defendant to pay up. The second agreement is well established *in fact*, whatever may be the technical objections to its being admitted in evidence. I am unable thus to come to a different conclusion on the merits of the plaintiffs' claim, and I should be sorry to defeat it on a comparatively unimportant point of adjective law, unless I am compelled to do so.

I am not at all clear that the finding as to Rs. 1,100 being still due to plaintiff would be *res judicata*, or that defendant has no remedy to set aside that finding. But even if such be the case, that is not, in my opinion, a good ground for helping him by the use of my revisional jurisdiction to avoid the payment of what I believe with the Judge to be a just debt, and for relegating the plaintiff to further litigation.

I therefore adhere to my former order and reject the application. As there was something to be said for the defendant on the strictly legal aspects of the case, I direct the parties to pay their own costs of the present proceeding.

Application rejected.

No. 24.

Before Mr. Justice Chatterji and Mr. Justice Clark.

SHAD ALI KHAN,—(PLAINTIFF),—APPELLANT,

Versus

ABDUL GHAFUR KHAN AND OTHERS,—

(DEFENDANTS),—RESPONDENTS.

} APPELLATE SIDE.

Case No. 269 of 1896.

Custom—Alienation—Distinction between gifts inter vivos and wills—Onus probandi—Pathans of Peshawar District.

Although a proprietor has, by custom, a plenary power of alienation *inter vivos*, it does not follow that he has, by custom, a power of alienation by will, and the *onus* of proving that he has the latter power rests upon the party taking his stand on the will, especially when an alienation by will is void under the personal law of the proprietor.

The distinction between gifts *inter vivos* and wills discussed by Chatterji, J.

First appeal from the order of W. B. DeCourcy, Esquire, District Judge, Peshawar, dated 2nd December 1895.

Lal Chand, for appellant.

Madan Gopal and Umar Bakhsh, for respondents.

The case was remanded for further inquiry upon the point of custom by the following order of the Court :—

CHATTERJI, J.—Muhammad Ibrahim Khan, Khan of Zaida, 15th Feby. 1898. died in 1886, leaving three sons, Abdul Ghafur Khan and Najaf Khan, defendants, by one wife, and the plaintiff, Shad Ali Khan, by another. The plaintiff's mother died while he was a babe in arms, and he was brought up by his mother's relations. The plaintiff has lately attained majority, and sues for a half share of the property left by his father under the rule of *chundawand*.

The defendants plead that (1) the deceased made a will, which was left in the custody of the Reverend Mr. Hughes, by which plaintiff was left 139 *kanals* 8 *marlas* 7 *sarsais* of land and a Persian-wheel and two houses, and cannot claim anything more; (2) defendant No. 1, as Khan, is entitled to all the property, a list of which is attached to the written statement pertaining to the Khanship; (3) defendant No. 1, by tribal custom, is entitled to a double share of the paternal property as the eldest son; (4) the plaintiff as the son of a Hindki woman is entitled only to a half share of what a son by an Afghan wife, like defendant No. 2 would get, which would amount to 105 *kanals* 5 *marlas* and two houses, but has got more under the will,

(5) the plaintiff has no claim to the *muafi*, and (6) the 200 *kanal*s at Garh Munara are the self-acquired property of defendant No. 1. The will set up by defendants consists of two parts, *viz.*, the original will, which is dated 17th April 1874, and a codicil executed on 12th January 1880.

The plaintiff denies that he is the son of a Hindki woman and traverses the other allegation. He also restricts his claim to property left by the father and does not ask for a share in the *muafi* grant by Government.

Only two issues have been drawn and inquired into, *viz.*, “(1) whether the will propounded was executed or not by ‘Muhammad Ibrahim Khan?’ If so, (2) whether he was or ‘was not competent with reference to custom to execute it.’” Pleadings for the parties appear to have told the District Judge that inquiry on these points should be made in the first instance.

The District Judge has found against the plaintiff on both issues, and dismissed his claim, except for the land bequeathed to him by the will. This land is difficult to find out, and two commissions for this purpose were unsuccessful. The District Judge has finally left the matter to be ascertained in execution of decree.

The plaintiff appeals challenging the finding of the lower Court on both issues.

As regards the execution of the will, we see no reason after going through the evidence, for differing from the opinion of the District Judge. The witnesses produced by defendants on this point are men of respectability, and three of them appear to be Christians, whose testimony, in a dispute of this character, may be fairly assumed to be impartial. The original will is signed by the deceased, but the body of it written by someone else, but the entire codicil is in the deceased's handwriting. We have seen the documents in original, and can find no grounds for suspecting their genuineness. Muhammad Shuaib and Unwan-ud-din depose to recognizing the handwriting of Muhammad Ibrahim Khan in the codicil, and his signature under the will. Yusuf Ali, an attesting witness to the former, deposes to its having been written in his presence. The codicil is also attested by the Reverend Mr. W. Jukes, and Yusuf Ali further speaks to his having signed before him. Imam Shah and Aziz-ud-din recognize the signature of Mr. Jukes, and also an endorsement by the Reverend Mr. Thwaites in English, to the effect that the

will had been left at the Mission, and was given to the agent of defendant No. 1 by his instructions. The will and codicil are written on two sides of a stamp paper of the value of Re. 1, and they remained in the custody of the Peshawar missionaries since the execution of the first by the deceased until 15th June 1894. They were produced in the mutation proceedings on his death, and are referred to in them. There is absolutely no reason to doubt that both the documents were duly executed by Muhammad Ibrahim Khan, and we accordingly concur with the District Judge, and decide the first ground of appeal against the appellant.

The second issue is, as the District Judge rightly says, the most important issue in the present inquiry. We also concur with him that the will is not bad on the ground of undue influence. No such plea was specifically raised, as it should have been, and the plaintiff is by the very nature of his statement as regards the will, *viz.*, that he was ignorant of its execution, precluded from putting forward such a contention. There is no evidence, and there are no circumstances, giving the least support to anything that the mind of the testator was improperly influenced to make the present disposition of his property.

It remains to be seen whether the will is valid by custom. It is admitted that the will is bad under Muhammadan Law. The District Judge did not lay down on whom the burden of proof lay as regards the second issue, though he stated in his order of 13th June 1895 that it would be fixed at the next hearing when the parties filed their documentary evidence. But the defendants were made to produce their evidence first, though the District Judge in his judgment considered it unnecessary to decide on whom the *onus* lay, as he was satisfied that the owner had, according to the settlement record, plenary power of alienation, generally speaking, and that such power had been exercised by will over and over again.

We are of opinion, however, that the question of *onus* cannot be altogether ignored, and that it rests on the party taking his stand on the will. The District Judge is wrong in saying that customary law makes no distinction between the power of making alienations *inter vivos*, and of making those which are to take effect after death. The distinction has been repeatedly pointed out in several recent decisions of this Court. There is no good ground for the District Judge's opinion that the remark in No. 90, *Punjab Record*, 1891, relating to the

distinction between wills and gifts in Customary law is extra judicial. It is a deduction made from certain authorities previously quoted in the judgment, and is part of the reasoning on which the final decision in the case is founded. In No. 88, *Punjab Record*, 1895, the difference between the power of gift *inter vivos* and that by will is explained. See also No. 83, *Punjab Record*, 1895. The whole subject is fully discussed, and the principles of distinction ably summarised in Roe and Rattigan's Tribal Law, pages 25, 81 and 124, 125. In page 81 the learned authors, speaking of wills among agricultural communities, say: "Not one man in a hundred, "or even in a thousand, is capable of drawing up, or even of "dictating a proper will, and to admit oral wills would be an "absurdity. Nor can it be said that the power of disposing "of property by will should be regarded as the same as that "of gifts *inter vivos*. By a gift a man injures himself as well "as his heirs, by a will he injures his heirs only. Tribal "custom universally insists on a gift being accompanied by "possession, just as it insists on the public notification of an "heir by adoption." Another ground for making the distinction between the two kinds of alienation in such communities is this. When a man gifts property in his lifetime, he is able to perfect it by possession, which is an important element in the acquisition of title, particularly in an archaic state of society. But when the donor is dead, and is unable personally to give effect to his act, how is the donee to obtain possession of the thing gifted?

His title does not accrue until after the donor's death, by which all the latter's rights in his property pass to his heirs. The donee thus can get nothing unless there is some special agency to give effect to the donor's last wishes. Again a gift without possession avails nothing against the donor or his heirs, but this rule must be abrogated before a gift to take effect after death can be enforced. These are essential differences in the nature of the two kinds of gift, and it is wrong to assume that in Customary Law the concession of the power of making gifts *inter vivos* necessarily implies concession of the power of making gifts by will.

Among Afghans of the Peshawar District, land is obviously held on tribal principles, but owing to a variety of causes the power of alienation *inter vivos* is more plenary than among agricultural tribes in other parts of the Punjab, particularly its central and eastern districts, The *Riwaj-i-am* lays it

down, and the report of the Regular Settlement, paragraph 604, admits that the entry accords with actual practice. This was also further recognized in No. 23, *Punjab Record*, 1893, though the *dictum* is not absolutely binding, as the case was one from Hazara District. The *Riwaj-i-am*, however, makes a writing and possession essential conditions of validity, and this necessarily excludes wills which are not mentioned. There are also at least two published cases in which wills have been upheld among Pathans of the Peshawar District, *viz.*, 94, *Punjab Record*, 1884, and 44, *Punjab Record*, 1897. But they related to Khalils of the Peshawar *tahsil*, and the wills were of a different character. They were gifts by childless proprietors in favour of persons related through females in the presence of somewhat distant agnates. They were upheld, as the custom was found established by instances, and in the first case the Court expressly guarded itself against its being treated as an authority on the question of the power of a testator in the presence of sons. In the second case some instances of wills were quoted partly analogous to the present one, and the defendant is entitled to the benefit of both precedents so far as they bear on the probability of Muhammad Ibrahim Khan, a Yusafzai Pathan, in the *ilaka* of Uthman, where the parties reside, having the power of testation he has exercised. But taking the entry in the *Riwaj-i-am* and the general principles above adverted to, which should govern such an inquiry, we think the *onus* lies on the defendants, who take their stand on the will, to prove that it is valid.

We do not wish, however, to lay any undue stress on this point, but merely to define the lines on which the inquiry should proceed. The main object is to enable the parties to understand their position, so that they may be able to produce all their evidence, and a decision proceeding simply upon such a point is justifiable only when it is not possible to pronounce a positive opinion on the evidence.

Now, proceeding on these principles, we have great difficulty in deciding the case on the present record, unless we adopt the unsatisfactory expedient of disposing of it on the question of *onus*. We say unsatisfactory as the point involved in this issue is one of great importance, and the case itself is of large value. The oral evidence is of little weight in a matter of this kind, and as the witnesses belong to the Peshawar District and are Pathans, a large element of party spirit underlies the evidence they give, for which allowance

has to be made. The precedents quoted need not be noticed in detail at present, as we mean to order further inquiry. Every instance that rests on purely oral testimony ought to be carefully sifted, and wherever possible the Court ought to come to a finding, (1) whether it has any bearing on the question involved in the second issue, and (2) how far it is proved. Before us counsel on both sides referred to a large number of instances culled from the oral evidence, but they have not been discussed by the District Judge, and we are therefore left without his assistance in coming to a decision as to their value. The instances resting on documentary evidence, viz., records of Civil and Revenue cases, are too few to enable us to pronounce a decided opinion affirming or negating the father's right, by custom, among this class of Pathans in that part of Peshawar, to make a distribution of property by will at his pleasure among his sons. We refrain from considering them in detail at present, but we may point out that, so far as the records before us show, the District Judge appears to be incorrect in saying that the mutation of Ajab Khan's property was made according to his will. The Assistant Commissioner, no doubt, on 22nd January 1885, gave such an order, but it was set aside by the Deputy Commissioner on 20th March 1885, and mutation was directed to be made jointly in the names of all the sons in equal shares till their dispute was settled by the Civil Court. On 28th April 1885 the Commissioner upheld this order.

Some of the witnesses attempt to make a distinction between the custom of Khans and of ordinary Pathans. This should be borne in mind in making the inquiry.

Defendants' counsel asserted before us that most of the property claimed appertains to the Khanship, that defendant No. 1 is exclusively entitled to the same, and that the will, so far from injuring the plaintiff, gives him more than he would be otherwise entitled to. It is important to decide this question also at this stage, and in fact all the other issues raised by the pleadings now that the case has to go back, so that it may be ready for final decision when the return comes.

We remand the case to the lower Court to make a full and exhaustive inquiry as regards the second issue. The parties should be allowed every opportunity to produce all the evidence they consider necessary, and we suggest to the Court to send for of its own motion and examine persons of respectability and known probity and impartiality, whose

opinions on the point of custom would be relevant under Sections 48 and 49 of the Evidence Act, and valuable as guides for decision. The other issues arising in the case should also be framed, inquired into and found upon.

The return of the lower Court will be submitted with all reasonable despatch.

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No. 25.

Before Mr. Justice Chatterji and Mr. Justice Clark.

NIZAM DIN AND OTHERS,—(PLAINTIFFS),—
APPELLANTS,

Versus

JAGAT SINGH, MINOR, THROUGH KESAR SINGH AND
ANOTHER,—(DEFENDANTS),—RESPONDENTS.

} APPELLATE SIDE.

Case No. 716 of 1895.

Custom—Adoption of daughter's son—Ghumman Jats of Sialkot District—Perversion of next collaterals to Muhammadanism.

According to the *Riwaj-i-am* of the Sialkot District, it is competent to a Ghumman Jat to adopt his daughter's son, but a nephew has a prior right to be adopted. Where, however, the nephews had perverted to Muhammadanism, held, that it lay upon them to prove that they were entitled to be adopted in preference to a daughter's son and that their existence rendered the adoption of such daughter's son invalid, and that they had failed to prove this.

Found, under the circumstances of the case, that the *factum* of adoption had been sufficiently proved.

Further appeal from the order of A. Christie, Esquire, Divisional Judge, Sialkot Division, dated 11th April 1895.

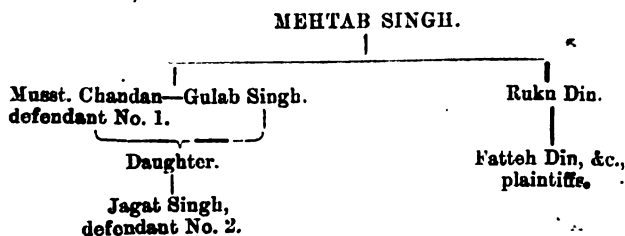
Ganpat Rai, for appellants.

Morton, for respondents.

The judgment of the Court was delivered by

CLARK, J.—

17th Feby. 1898.



On 5th September 1887 Gulab Singh executed and registered a deed of adoption in favour of Jagat Singh. Plaintiffs sue to have the deed cancelled.

The first question is the factum of adoption. Gulab Singh never cancelled the deed of 5th September 1887, though he did not die until 1894; he gave mutation of names to Jagat Singh; Jagat Singh, both before and after, lived in his house, he was his daughter's son, and his next collaterals had turned Muhammadans.

The adoption is sufficiently proved by the deed and the treatment.

The next question is the validity of the adoption.

The parties are Ghumman Jats of the Sialkot District.

By the *Rivaj-i-am* a Ghumman Jat can adopt his daughter's son, but a nephew has a prior right. Nor is the right of adoption denied in the plaint, what is alleged there is that a daughter's son could not be adopted in the presence of plaintiffs, the question then is whether plaintiffs, having become Muhammadans, could still claim to be adopted by Gulab Singh, and exclude Jagat Singh from adoption. No precedents are quoted on the point, nor is it likely that precedents would be forthcoming.

The question of loss of right to succession on account of change of religion (Act XXI of 1850), does not arise, the question is of the right to be adopted.

To expect a Jat Sikh to adopt a Muhammadan pervert is out of the question: one of the main objects in adoption is, under the Customary Law of the Punjab, for a sonless man to procure some one to attend and care for him, or, as Sir C. Roe says, page 93 of his book on Tribal Law, it is founded on the practical benefit of companionship and assistance. There could be no community of living and very little companionship and assistance between the adopter and adopted in such a case.

It is hardly conceivable that custom should require Gulab Singh to adopt plaintiffs, if he wanted to make an adoption. A custom represents the general wish and practice of a community: a body of Sikhs would not be likely to admit the rights of adoption of a pervert, who had offended the whole community by his perversion, in preference to a daughter's son.

It was the "brotherhood" which originally expounded and enforced custom, and it cannot be supposed that they would admit a pervert's claim to adoption.

We think under the circumstances that it lay upon plaintiffs to prove that they were entitled to be adopted in preference to a daughter's son, and that their existence rendered the

adoption of a daughter's son invalid, and we think that they have failed to prove this.

We dismiss the appeal with costs.

Appeal dismissed.

No. 26.

Before Mr. Justice Frizelle.

LALA HAR BHAI, — (PLAINTIFF), — APPELLANTS,

Versus

BHANA, — (DEFENDANT), — RESPONDENT.

} APPELLATE SIDE.

Case No. 976 of 1897.

Custody of minor—Marriage of minor without consent of paternal relations—Respective rights of minor's husband and paternal uncle.

A minor girl, aged about 8 years, whose father was dead and whose mother could not be found, was given in marriage to respondent by her maternal grandmother without the consent of appellant, the minor's paternal uncle. The latter applied for the guardianship of the minor, but the District Judge dismissed his application on the ground that, if the marriage was unlawful by reason of the grandmother's incompetency to celebrate it, applicant was "at liberty to seek his remedy in a Civil Court."

Held, that the right of giving the minor in marriage lay with the appellant, and that even if a marriage had taken place between respondent and the minor, the respondent did not thereby acquire the right of guardianship when the paternal relations did not consent to the marriage.

Miscellaneous appeal from the order of Diwan Lakhmi Das, Additional District Judge, Sialkot, dated 22nd July 1887.

Parkash Chand, for appellant.

The judgment of the learned Judge was as follows :—

FRIZELLE, J.—The case has not been well inquired into by the lower Court, but it is perfectly clear that its order is wrong. Mussammat Hukmi now before the Court is a child of about 8 years of age. Appellant is her father's brother. Her mother's whereabouts, it is admitted, are not known. Without appellant's consent or that of any of the other paternal relations, the maternal grandmother has married her to respondent, a man who looks about 30 years of age. By law appellant has a superior right of guardianship to the maternal grandmother, the mother having abandoned the girl. The right of giving the girl in marriage lay with appellant, and the other paternal relations, and even if a marriage has taken place between respondent and the minor, this does not give respondent the right of guardianship, when the paternal relations did

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not consent to the marriage. The conduct of the maternal grandmother in giving such a child in marriage to a man of 30, and the conduct of the latter in taking such a child in marriage without the consent of those who had the right to dispose of her, disentitle both respondent and the maternal grandmother to any right of guardianship. I reverse the order of the lower Court and appoint appellant guardian of the minor's person. There is no necessity to pass any order as to the property. Respondent to pay costs in both Courts.

No. 27.

Before Mr. Justice Chatterji and Mr. Justice Clark.

BALLIA RAM.—(PLAINTIFF),—APPELLANT,

Versus

MUSSAMMAT VED KAUR AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

APPELLATE SIDE. }

Case No. 1133 of 1895.

Will, construction of—Principles of construction—Bequest to Hindu widow as malik—Presumption as to nature of bequest to Hindu female.

Although in construing a will, the Court should endeavour to gather the intention of the testator from the words actually employed by him, it is quite legitimate (subject to the express terms of the will) in construing the will of a Hindu with reference to a bequest in favour of a female to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property. Ordinarily, their ideas are repugnant to giving a female a power of alienation over immoveable property, especially if it is ancestral, and it may, therefore, be properly presumed, in the absence of clear indications to the contrary, that a devise of such property to a Hindu female does not confer an estate of inheritance, but only a life estate or a widow's estate as understood by Hindu Law. Nor is it a necessary result from the use of the term *malik* in respect of a Hindu female to whom a bequest is made, that she should be considered the absolute owner of the property so bequeathed to her.

Applying the above principles of construction to the terms of the will in the present case, the Court held that, as the words used by the testator on the whole admitted of the interpretation that it was intended to give merely a life estate or a widow's estate to the female devisee, such interpretation should have preference.

Further appeal from the order of Khan Muhammad Hayat Khan, C.S.I., Additional Divisional Judge, Amritsar Division, at Jullundur, dated 25th July 1895.

Fazal Din, for appellant.

Lal Chand and Ishwar Das, for respondents.

The facts of the case and the material terms of the will are fully stated in the judgment of the Court, which was delivered by

CHATTERJI, J.—One Dasu Mal, an Arora resident of Amritsar, made a will on 4th February 1878, by which he devised a house and a shop to his son's widow Mussammat Ved Kaur, and this son's adopted son, Rallia Ram, and certain other property to his widow and infant daughter. He also made his widow the legatee of the undisposed residue of his estate, giving her full power of alienation in respect of the same. Rallia Ram, plaintiff, was a minor at the time of the will. Besides being the adopted son of Mussammat Ved Kaur, he is also her sister's son. Dasu Mal died about 1880 A. D.

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There was some litigation between the plaintiff and Mussammat Ved Kaur about the realization of the rents of the devised property, in which Mussammat Ved Kaur remained ultimately unsuccessful. She then sued for partition of her half share in August 1892. The issue decided by the Subordinate Judge, who tried the case, was "Was half of the right in the property in suit given to the plaintiff by the will, and can she get it divided and take possession of it." The defendant then pleaded that she was not entitled to partition but only to maintenance, and that she had received it for fourteen years after the death of the testator.

The Court held that the will was not explicit as regards the right the parties respectively had under it, but that, as the defendants had admitted in the previous suit regarding rent that the plaintiff Mussammat Ved Kaur could have rent deeds written in her favour for half the property, she was entitled to have it divided so long as the parties did not alienate it, though ordinarily a mother is not entitled to more than maintenance. He therefore gave her a decree, but recorded that the parties were incompetent to alienate their shares without each other's consent.

Having divided off her share, Mussammat Ved Kaur sold half the house and shop by deed, dated 10th November 1894, to the respondents Karam Singh and Partap Singh, for Rs. 1,500 which was made up thus :—

	Rs.	A.	P.
Due to the vendees on account of a registered bond, No. 164, dated 13th May 1893	858	13	3
Interest on the same	102	0	0
Advances made since the date of the bond	110	0	0
Paid before the Sub-Registrar	429	2	9
Total	1,500	0	0

The plaintiff has brought the present suit for a declaration that the defendant Mussammat Ved Kaur had no power of alienation, and that the sale would not bind him after her death.

Both the Courts below have construed the will as giving Mussammat Ved Kaur an absolute interest with full power of alienation to Mussammat Ved Kaur in half the property devised to her and the plaintiff jointly, and this is the principal question before us in this appeal. The second issue whether she had sold for necessity has not been decided.

There can be no question that the intention of the testator is to be gathered from the will as a whole, so that, as far as possible, every clause or word in it may have effect. This is what the lower Courts have professed to do. There is also no doubt of the correctness of the respondents' contention, as we understand it, that, with reference to that intention, we have to restrict ourselves to the actual language employed by the testator, or, in other words, the question is not what he meant, but what his words mean. We cannot give effect to what we conceive to be his real intention against the plain meaning of his language.

Subject to the above proviso, however, we consider it legitimate in construing the will, with reference to the bequest in Mussammat Ved Kaur's favour, to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property. It is rare to find females vested with power of alienation over immoveable property (the more so if it is ancestral) by Hindu Law or custom prevalent among Hindus in this Province. Ordinarily their ideas are repugnant to giving her such a power, and it may therefore be properly presumed, in the absence of clear indications to the contrary, that a devise of such property to a Hindu female does not confer an estate of inheritance, but only a life estate or a widow's estate, as understood by Hindu Law. We take this to be a well-established rule of construction, which should be applied in the present case, the deceased Dasu Mal having been a high caste Hindu and a resident of a town, though the property gifted is not ancestral. As already stated the ordinary presumption arising from Customary Law would probably be still stronger.

Respondents' counsel, however, insists that there is no such rule, and that no regard should be paid to any consideration of this description. We are unable to accede to this

contention, which, it may be observed, is irrespective of the provision in the will about alienation to which reference will be made hereafter, and is advanced on the authority of a recent Calcutta case *Lala Ramjewan Lal v. Dal Koer* (I. L. R., XXIV Cal., 406). In that case the testator in his will provided, *inter alia*, that his daughters and brother's daughters "shall be *maliks* and come in possession in equal shares of all the moveable and immoveable properties," that in the event of any of them dying childless her share "shall devolve in equal shares to the surviving daughters," "but such share shall have no connection with her husband's family." The will made a further provision that the daughters should not have on any account the right to alienate their shares. It was held that the word "*malik*" ordinarily implied an absolute gift, and that there was no authority for introducing into the will what was said to be the prevalent Hindu idea that a female ought not to obtain anything beyond an estate for her life-time; that the will was not open to the construction that it conferred only a life estate on the daughters, and that the limitations against the power of alienation were void. This was a will to which the Hindu Wills Act, XXI of 1870, applied, and in our opinion the decision is not applicable to the present case. Nor with all deference to the learned Judges, can we subscribe to their remark that there is no authority for the position that it legitimate to construe the word "*malik*" or words to the same purport in a "devise by a Hindu" in favour of a female with reference to the prevalent notions among Hindus regarding the tenure of immoveable property by women. On the contrary there appears to be plenary authority for such a principle of construction. See *Soorjesmoney Dossee v. Denobundoo Mullick*, 6 M. I. A., 526, 550, in which their Lordships of the Privy Council say "Primarily the words of the will are to be considered. They convey the expression of the testator's wishes, but the meaning to be attached to them may be affected by surrounding circumstances, and where this is the case, those circumstances no doubt must be regarded. Among the circumstances thus to be regarded is the law of the country under which the will is made, and its dispositions are to be carried out. If that law has attached to particular words a particular meaning or a particular effect, it must be assumed that the testator, in the disposition he has made, had regard to that meaning or that effect, unless the language of the will or the surrounding circumstances displace that assumption." In *Koonjbehari Dhur v. Prem Chand Dutt*, I. L. R., V Cal., 684, a

devise of immoveable property to the testator's wife and his daughter's sons in specified shares with power to the wife to adopt a son, was held to confer on the latter merely a life interest by construing the words of the gift with reference to the provisions of the Hindu Law. In *Mahomed Shumsool Hooda v. Shewuk Ram*, *L. R.*, 2, *I. A.*, 7, their Lordships of the Privy Council observe : " In construing the will of " a Hindu, it is not improper to take into consideration what " are known to be the ordinary notions and wishes of Hindus " with respect to the devolution of property. It may be assumed that a Hindu generally desires that an estate, especially an ancestral estate, shall be retained in his family, and " it may be assumed that a Hindu knows that, as a general rule " at all events, women do not take absolute estates of inheritance which they are enabled to alienate." The above rule was followed in *Punchoo Money Dossee v. Troylucko Mohiney Dossee*, *I. L. R.*, *X Cal.*, 342, in interpreting the words " My " wife K is the *malik* thereof " to mean not an absolute estate capable of alienation. See also *Hira Bai v. Lakshmi Bai*, *I. L. R.*, *XI Bom.*, 573, where the same principle was approved and acted on.

The other cases quoted by respondents' counsel do not lay down anything to the contrary. In *Lalit Mohun Singh Roy v. Chukkun Lal Roy*, *I. L. R.*, *XXIV Cal.*, 834, the facts were different, and nothing in favour of respondents' argument can be deduced from the judgment. The word "*malik*" in the will in that case was used with reference to a male. The same remark applies to *Vyadinada v. Nagammal*, *I. L. R.*, *XI Mad.*, 258, but in page 260 the learned Judges in discussing the Bombay case above cited appear to assent to the rule of construction there adopted that " it was repugnant to general " Hindu custom that the testator intended to give his widow " more than the qualified interest of a Hindu widow in her " moiety."

We therefore over-rule the contention, and proceed to the interpretation of the will taking the above rule as one of our guides. Of course the actual meaning of the words employed is the most important matter for consideration. The present will, however, is badly drawn, apparently by a person who had no knowledge of drafting and whose acquaintance with the Urdu language was imperfect. The words upon whose interpretation the decision of the suit depends are these :—

Aur bad wafat mere bannujib tafsil mundarj a zail har ek waris malik mulasarrif jo makan jinke nam par likh diye gaye hain, bad mere wafat ke unko ikhtiar hoga ke amdani kiraya se aukat basri kare, ya bamarzi jiske pas chahe rahan, bai intik kar de, donon men koi kisi ka muzahim wa mutariz na hoga.

The whole clause is badly expressed, and in consequence of its involved language, repetitions and bad grammar, a literal interpretation of the words used would land us in inconsistencies and absurdities. In the beginning the testator is seemingly speaking of each heir individually, but the pronouns used are plural ones, though the verbs are not, and then he winds up by saying that neither of the two would have any power to interfere with, or object to, the action taken by the other with respect to the property given to that other. It is contended by the appellant that the legatees are divided by the testator into two groups, and that his intention in this clause is only to provide that each group will have the fullest power of enjoying the income of the property gifted to it, and of alienation at pleasure without reference to, or power of interference by, the other. The bequests are certainly on this principle, certain properties being given to plaintiff and Mussammat Ved Kaur, and certain others to the testator's wife and daughter, and the tenor of the will is to keep the two groups distinct. The objections to this construction lie in the words "*har ek*" and "*waris*," both of which mean individual heirs; but, on the other hand, the pronouns that follow are in the plural number though the verbs are singular. But there would be no impropriety if each group is treated as a unit, and the plural pronouns would not in that case be an insuperable difficulty.

It is perhaps unfortunate that the interpretation of the testator's intention should necessitate a minute and critical examination of the clumsy sentences and imperfect grammar of an ignorant scribe, but the interpretation does not rest on this only, but on other and more substantial grounds as well. If the testator meant to refer to each of his heirs individually, it is curious that he did not make his bequests in the same way. A cursory glance at the first portion of the clause quoted might seem to show that he did so, but in fact there is no property bequeathed to any one individually, which could be separately enjoyed or disposed of at his pleasure. The legatees were divided into two groups, each consisting of two persons, and to the persons of each group jointly

items of property were gifted. Separate enjoyment and disposition required at least a separation of their interests. Again the divisions were natural, each group was formed of a mother, natural or adoptive, and a child, and the latter in both groups were minors, incapable of taking care of their bequests, and the testator evidently regarded the interests of mother and son in each case as identical and made them joint bequests. Naturally his attention was not directed to his legatees individually, but in groups, and his provisions were directed to prevent friction and mutual interference between these. Both the Courts below admit that the word "*dono*" does refer to the groups, but the District Judge says it also means something more, *viz.*, that it prohibits interference *inter se* between the members of each group, but this is not to be found in the words but has to be added. The Divisional Judge reads the clause without the sentence beginning with "*donon men.*" In this way of course the remainder more readily admits of the interpretation he has put on it, but his method is open to the objection he himself makes to the construction of the other party, *viz.*, that it does not read the different parts of the will together. There can be no doubt that this sentence is intimately connected with the previous one. He then interprets the sentence by itself and puts into it a meaning its words do not bear, *viz.*, that the members of each group are also not to interfere with each other. Finally the plaintiff stood to Dasu Mal in the relation of a grandson, while Mussammat Ved Kaur was a widowed daughter-in-law. While therefore Dasu Mal would do everything to secure her maintenance for life, there is no special reason why he should give her power to transfer any of his immoveable property to others. It would scarcely be reasonable to suppose that he would put plaintiff and Mussammat Ved Kaur on the same footing. The latter as a Hindu widow was expected to live simply and devote herself to pious ways and her needs therefore were few, while plaintiff would grow up, marry and become the head of a new family. We therefore think it more likely that Dasu Mal meant to give Mussammat Ved Kaur only a life estate or a widow's estate. As the words used on the whole admit of this interpretation, it ought to have preference. The word *malik* on this construction would have no bearing in her favour. The case reported in Volume X of the Calcutta Series, and the other authorities already referred to, would show that it is not a necessary result from the use of the term in respect of a Hindu female to whom a bequest is made, that

she should be considered the absolute owner, and we are prepared to adopt the same view in this case.

On this finding on the first issue, it is necessary to go into the second, which has not been decided by either of the Courts below. The parties however have produced all their evidence, and it is not urged that any evidence has been excluded. We think it right therefore to save the parties the trouble of a remand simply for the purpose of a finding when no further inquiry is needed.

The *onus* of proof on this issue is exclusively on the defendants. They have produced evidence as to the payment of consideration, but practically none to show the extent there was necessity for the advances made. Mussammāt Ved Kaur has not gone into the witness box herself, and the only lawful necessity that we can find for her borrowing money was the partition case. Even here she was decreed Rs. 169 as costs, out of which she realized Rs. 143 from the plaintiff on 6th October 1893, more than a year before the sale. The pleaders called by the defendants give no definite evidence, and the notice issued by Mussammāt Ved Kaur on 2nd July 1894 to pre-emptors offering to sell the property in dispute mentions no necessity. In short there is no tangible proof of necessity. Neither the marriage of *Tulsi*, nor that of her sister's daughter, can be held to be occasions for lawfully contracting debts on the security of immoveable property on the part of Mussammāt Ved Kaur. Her account in the vendee's book shows that nearly Rs. 1,000 were advanced to her in less than four years, while she was able to get on without debt for ten years after Dasu Mal's death. The case for the defendants is so obviously weak on the second issue that their counsel contented himself, in reply to appellant's arguments, with simply saying that the opinion of the lower Courts had not been given on the evidence. We are practically obliged therefore to find against them on that issue.

We accept the appeal and, setting aside the decrees of the lower Courts, decree the plaintiff's claim with costs in all the Courts.

Appeal allowed.

No. 28.

Before Mr. Justice Chatterji and Mr. Justice Clark.

MIR KHAN,—(JUDGMENT-DEBTOR),—APPELLANT,

APPELLATE SIDE. }

Versus

JIWE KHAN,—(DECREE-HOLDER),—RESPONDENT.

Case No. 1286 of 1896.

Civil Procedure Code, 1882, Sections 231, 244—Application for execution of whole decree by one of several joint decree-holders—Dismissal of application—Appeal.

An application for execution of the whole decree was made, under Section 231 of the Civil Procedure Code, by one of four joint decree-holders, but was dismissed by the District Judge on the ground that the decree could not be executed until all the decree-holders joined in the application. It appeared that the judgment-debtor was not summoned to defend the application, but on appeal from the District Judge's order he was impleaded as well as the other co-decree-holders. The Divisional Judge ordered that the execution should proceed on the applicant joining with him such of his co-sharers as were willing to execute the decree jointly with him, and impleading the rest who objected and declined to take out execution, and that the Court should take possession of the entire land decreed, and separate off the shares of the applicants from those of the others through the agency of the Collector. The judgment-debtor appealed to the Chief Court, and it was contended on his behalf that the order of the District Judge under Section 231 of the Code was not appealable, and that therefore, the order of the Divisional Judge was without jurisdiction and void.

Held, following *1. L. R., XVII Mad., 394*, that the Divisional Judge had jurisdiction to hear the appeal.

Although, if an application under Section 231 of the Code is dismissed without summoning the judgment-debtor or issuing process, and the latter is not made a party to the appeal, the question may be one beyond the province of the Appellate Court to adjudicate upon, yet if, as in the present case, the judgment-debtor is impleaded on the appeal, the question then becomes one under Section 244 of the Code, and an appeal lies.

The Court refused, under the circumstances of the case, to interfere with the order of the Divisional Judge on the merits.

Miscellaneous appeal from the order of Khan Muhammad Hayat Khan, C.S.I., Divisional Judge, Jullundur Division, dated 15th August 1896.

Muhammad Shafi, for appellant.

Sant Ram, for respondent.

The judgment of the Court was delivered by

22nd Feby. 1898.

CHATTERJI, J.—In this case a decree was passed by this Court subject to a restriction, which is not now material, in

favour of the respondent Jiwe Khan and four others for proprietary possession of 138 *kanals* 16 *marlas* of land, *khevat* Nos. 18 and 2, in *mausa* Sanwana. This was on 5th March 1896.

Jiwe Khan applied for execution of the whole decree under Section 231, Civil Procedure Code, in the Court of the Additional District Judge. The other decree-holders did not join, and an objection appears to have been made on behalf of one of them, Ghulam Muhammad, a minor. The Court held that the decree could not be executed until Jiwe Khan's co-sharers joined and dismissed the application. The judgment-debtor Mir Khan appears not to have been summoned to defend the application.

On appeal Mir Khan was impleaded as well as the other co-decree-holders, and the Divisional Judge ordered that the execution should proceed on Jiwe Khan joining with him such of his co-sharers as were willing to execute the decree jointly with him and impleading the rest who objected or declined to take out execution, and that the Court should take possession of the entire land decreed, and separate off the shares of the applicants from those of the others through the agency of the Collector.

From this order the present appeal has been filed by the judgment-debtor.

The first ground of appeal is that the order of the Additional District Judge under Section 231, Civil Procedure Code, was not appealable, and that the order of the Divisional Judge is without jurisdiction and void. The case of *Gooroo Doss Roy, decree-holder, v. Ram Runginee Dossia*, XVII W. R., 136, is quoted in support of this contention as well as another reported in page 415 of the same volume in which it was followed. The other side quotes *Lakshmi Ammah v. Ponnassa Menon, &c.*, I. L. R., XVII Mad., 394, where the contrary was ruled.

The cases cited on appellant's behalf were decided under Act VIII of 1859, but the provisions relating to execution by some out of several decree-holders and those regarding appeal from orders in execution in that Act and in the present Code of Civil Procedure are very similar, and the cases are, therefore, authorities bearing on the question before us.

There are, however, material differences in the facts of this case and of that reported at page 136, W. R., Vol. XVII, which is the precedent relied on by appellant. In the latter

the judgment-debtor was no party to the appeal and the contest was simply between two joint decree-holders. Here the judgment-debtor was a party and was the person who primarily defended the appeal. In the second case quoted by the appellant the judgment-debtor appears to have been impleaded, but no notice was taken of this fact and the reasoning of first case was simply followed. It may therefore be put out of consideration.

After giving the matter our best consideration, we are of opinion that the view taken by the Madras Court is the sounder one and should be followed. It is very possible that, if the contest is merely between joint decree-holders, there would be considerable force in the reasoning of the Calcutta Court. Section 231 is one relating to execution of decrees, and there can be no execution without the judgment-debtor being a party to the proceedings. Where a dispute is between joint decree-holders alone without reference to the judgment-debtor, the proceedings cannot properly be called proceedings in execution.

In fact we conceive the provisions of Section 231, Civil Procedure Code, do not primarily contemplate the settlement of disputes between joint decree-holders, for it imposes on the Court the duty of taking measures for the protection of the interests of the persons who do not join in the application for execution. If they actually appear, they can take steps to protect themselves, either by joining in the application or definitely refusing to do so, in which case, if the shares of the decree-holders can be ascertained, execution can proceed as regards the interests of those who wish to enforce the decree. For we do not take Section 231 to positively lay down that, in the case of a joint decree, there can be no execution except for the whole, but to be merely an enabling section providing a procedure for some out of several decree-holders executing the entire decree. (See *Brojeswari Chowdhranee v. Tripoorra Soonderee Dabi*, III, Calc., L. R., 513 ; *Hurrish Ohunder Chowdhry v. Kalisunderi Dabi*, I. L. R., IX Calc., 482, P. C., in which partial executions were allowed, and particularly the remarks of their Lordships of the Privy Council in the latter case at page 494). Another reason for our view, that Section 231 is not intended to apply to disputes between decree-holders, is that such disputes can only be finally settled in a regular suit, and not in execution of a decree against a third party. Section 231 therefore is primarily intended to facilitate execution in cases where the decree is a joint one in favour of several persons, and in all such

proceedings the judgment-debtor is necessarily a party. He can appear when process issues against him in execution of a joint decree and object to the order under Section 231, and the Court will be bound to listen to him. For example, he may urge that he has acquired the rights of some of the decree-holders, and that the whole decree cannot, therefore, be executed against him. This undoubtedly will be a question between the parties to the suit, and relating to the execution of the decree or discharge or satisfaction thereof, within the meaning of Section 244. See *Kudhai v. Sheo Dayal*, I. L. B., X All., 570. The decision of the executing Court will undoubtedly be subject to appeal.

It may be that, if an application under Section 231 is dismissed without summoning the judgment-debtor or issuing process, and the latter is not made a party to the appeal, the question may be one beyond the province of the Appellate Court to adjudicate upon. But where as in this case the judgment-debtor is a party, the question becomes one under Section 244, and an appeal lies. It was the judgment-debtor who contested the appeal in the lower Appellate Court, and it is he who is fighting the decree-holder here. We do not think he was improperly made a party to the appeal in the Divisional Court and no such objection has ever been urged by him. We therefore follow the Madras authority and hold that the Divisional Judge had jurisdiction to hear the appeal.

We do not see any necessity for interference with the order of the Divisional Judge on the merits. If Ghulam Muhammad objected to the execution before him, it is possible that he was wrong in ordering execution to issue for the whole decree, but since his order, a fresh application has been made, in which other decree-holders have joined, and the decree is now said to be fully executed. A *dakhalmama* has certainly been filed and attested. Mr. Muhammad Shafi says this is a fictitious document, and that Ghulam Muhammad's guardian put in a petition disclaiming execution, which was returned as the record was in this Court. As we do not fully know the facts, and as, in any case, a fresh joint application was a good authority for executing the decree as a whole, we do not wish to pass any order, which would have the effect of unsettling the completed acts of the execution Court. But our order will be without prejudice to the judgment-debtor, or any decree-holder who has not really joined in the new application to show the real facts. The execution Court will have full authority to inquire how far execution has been really carried

out this being one of the appellant's objections, and to pass any order which is necessary in the ends of justice. If appellant is actually in possession still, and Ghulam Muhammad will not dispossess him, we do not see that he really requires an order from us to protect him. He can of course maintain his possession.

For the above reasons, we uphold the order of the Divisional Judge and dismiss this appeal. But the circumstances being peculiar, we direct that the parties pay their own costs throughout.

Appeal dismissed.

No. 29.

Before Mr. Justice Stogdon and Mr. Justice Chatterji.

APPELLATE SIDE. {

BIRA SINGH AND OTHERS,—(DEFENDANTS),—APPELLANTS,
Versus

SHER SINGH AND OTHERS,—(PLAINTIFFS),—RESPONDENTS.

Case No. 312 of 1896.

Mortgage by widow—Decree of foreclosure against widow—Regulation XVII of 1806—Regularity of proceedings, presumption as to—Suit by reversioners for recovery of land after death of widow—Limitation Act, 1877, 2nd Schedule, Article 141—Res judicata—Estoppel.

Held, that as against a person in possession of land under a title created by a widow, or in virtue of a decree for possession obtained against a widow, the reversioners have, under Article 141 of the Limitation Act, twelve years from the date of the widow's death within which they can sue for recovery of the land.

Held, further, that where a suit is brought against a female heiress in possession in respect of any matter which strikes at the root of her title to the property, a decree fairly and properly obtained against her binds all the reversioners, but, inasmuch as the widow's estate is ordinarily a limited one, and as she represents the reversioners only in special cases, in order that such decree should bind the latter, it must be shown, in the first instance, that the litigation was one in which the entire interest in the estate she held in possession was at stake, and then, that she had sufficiently protected the reversioner's interests, and that there was a fair and proper inquiry.

A widow's position with reference to the reversioners' interests is like that of a trustee, and any failure or neglect on her part to defend those interests in any such litigation render a decree obtained against her valueless against the reversioners.

Where certain mortgagees had, during the widow's life-time, obtained a decree of foreclosure against her under Regulation XVII of 1806, *held*, that as against the reversioners, who sued for recovery of the land after

the death of the widow, the *onus* of proving that the said foreclosure proceedings were in due form and that the right of redemption was extinct, was on the mortgagees, there being no presumption in favour of the regularity and propriety of such proceedings.

A plea of estoppel by conduct, *held*, not established.

Further appeal from the order of Khan Muhammad Hayat Khan, O.S.I., Additional Divisional Judge, Amritsar Division, at Jullundur, dated 25th-26th February 1896.

K. P. Roy, for appellants.

W. H. Rattigan, Q. C., and Shelverton, for respondents.

The facts of the case are fully stated in the following judgment delivered by

CHATTERJI, J.—The material facts of this case are shortly *29th March 1898.* these :—

The plaintiffs are admittedly the male reversionary heirs of one Nihal Singh, a Jat of Rattangarh, in the *tahsil* and District of Amritsar, who died childless, leaving a widow, Mussammat Sobhan, about twenty-six or twenty-seven years before suit. Mussammat Sobhan succeeded to the land, and on 19th April 1872 she mortgaged it with possession to Partap Singh Bawa, father of the appellants, for Rs. 360 by way of conditional sale after a term of three years. On 8th January 1877 the mortgagee applied for issue of notice of foreclosure. On 14th August 1877, a report of service having been made, the proceedings were consigned to the record room. On 7th May 1879 the mortgagees sued for foreclosure, the year of grace having expired, against Mussammat Sobhan. The 5th June was fixed for her appearance for settlement of issues, but she appeared on the 7th after the case had been adjourned to the 16th June, and her statement was recorded. On the 16th June the case was not taken up, but on the 17th she filed a *jawab-dawa* denying receipt of consideration. No issues were framed, but a decree was passed in the mortgagee's favour on that date.

In April 1887 some of the present plaintiffs brought a suit for a declaration that the widow's alienation would not affect their reversionary rights, as it was without consideration. The claim, however, was dismissed as barred by time. The widow was then alive.

She being now dead, the plaintiffs brought the present suit for recovery of the land on the allegation that the mortgage was not binding on them, as it was fictitious one, and without consideration.

The defendants pleaded that the claim was barred by the suit of 1887 and by limitation, and that the mortgage was for lawful necessity and valid. It was also pleaded that the plaintiffs had been cultivating the land as defendants' tenants, and could not therefore challenge their title.

The first Court framed issues as to (1) the bar of the former suit, (2) bar of limitation, (3) estoppel by reason of tenancy, and (4) validity of the mortgage by Mussammat Sobhan. It decided the first two in plaintiffs' favour, but the last in defendants', and also held that plaintiffs, by cultivating the land under defendants, had in a manner consented to the alienation. It therefore dismissed the suit.

In the Court of Appeal the plaintiffs abandoned all contention as to the mortgage having been executed without necessity, and asked for redemption on payment of the mortgage money stated in the deed. They further objected to the validity of the foreclosure decree in 1879. The Divisional Judge permitted them to change their ground as regards the validity of the mortgage, and remanded the case under Section 566, Civil Procedure Code, for inquiry into, and report upon, the issue he framed, *viz.*, whether the litigation in the foreclosure suit was *bonâ fide*, and whether there was a full and fair trial in it.

The return of the lower Court was in defendants' favour, but the Divisional Judge in an elaborate judgment disagreed with its finding, and held (1) that the plaintiffs could challenge the foreclosure decree at that stage; (2) that there was no fair trial, and the decree therefore was not binding on plaintiffs, (3) that there was no proper foreclosure, and the right of redemption was therefore not extinct; and (4) that no estoppel was established against the plaintiffs by reason of some of them having been defendants' tenants in respect of the land in suit. He decreed the plaintiffs' claim for possession on payment of the principal amount Rs. 360 entered in the mortgage deed. From this decision the defendants appeal, and the case was argued for them on substantially the same grounds as were urged in the Court below. It was also contended that the claim is barred by time, owing to the adverse possession of the defendants since the decree of 1879, though this point is not taken in the written grounds of appeal.

I do not think that the objection that plaintiffs should not have been allowed to change their ground, and to claim redemption on payment of the full sum entered in the deed

of mortgage, is of much force. The Divisional Judge had a discretion in allowing them to take up a point not urged in the lower Court, or in the grounds of appeal, and it cannot be interfered with by us, except on cogent grounds and for the ends of justice. There are no such grounds in the present case. The plaintiffs never admitted the correctness of the decree of 1879, but sued for possession, ignoring it altogether. They claimed possession without payment, alleging the mortgage to have been made without consideration or necessity, but had necessity or consideration been established, the suit could not have been on that account, according to the practice usually followed in Indian Courts, dismissed altogether. It would still have been proper to decree redemption on payment of the sum found to have been validly raised by the widow, unless it was also found that the right of redemption was extinct, by reason of the mortgage having been converted into a sale. In order to go into this question, it would have been necessary to record the pleadings of the parties, and to inquire into the validity of the decree, if the plaintiffs objected to it. The point was thus an obvious one, which had been lost sight of by the parties, who were fighting the case on other issues. As soon as plaintiffs admitted the validity of the mortgage deed, the necessity of going into the question became manifest, and I consider the Divisional Judge acted in the interests of justice in allowing it to be raised. The defendants were entitled to a full inquiry when it was taken up, and such an inquiry has been made by order of the Divisional Judge. I may note that the defendants themselves did not rely on the decree of 1879 in the first Court at least so much as the decree of 1887. I would accordingly over-rule this contention.

The question of limitation may next be discussed. It is claimed that the defendants had adverse possession against the widow from the date of the decree, and that the plaintiffs' claim is therefore barred. The claim of the defendants was under an alienation made by the widow herself, and it has been uniformly ruled, from the time Act XIV of 1859 was enacted up to the present, that as against a person in possession under a title created by the widow, the reversioner is not barred, if he sues within twelve years from her death, *Nobin Chundar Ohuckerbutty v. Issur Ohunder Ohuckerbutty* (IX, W. R., O. R., 505, F. B.) and other cases on this point collected in Mr. Justice Rivaz's judgment, *Punjab Record*, No. 74 of 1895, pages 361, 362. His own opinion is that it is unquestionable that in such cases the collaterals have under Article 141, Act

XV of 1877, twelve years from the date of the widow's death. I did not understand this proposition was controverted by the learned counsel for the appellants. The cases quoted by him relate to a different point, viz., that the possession of a trespasser against the widow, which lasts long enough to bar her claim, also bars the reversioner, and that, in such cases, the limitation running against her runs against the reversioner, also *Luchhan Kunwar, &c., v. Manorath Ram* (I. L. R., XXII Calc., 445, P. C.); *Tika Ram v. Shama Charn* (I. L. R., XX All., 42) approving of *Hanuman Prasad Singh v. Bhagwati Prasad* (I. L. R., XIX All., 357). No case was quoted in which limitation was successfully pleaded against the reversioners by a person holding under a title created by the widow.

The cases in which reversioners have been held to be bound by a decision in a suit against the widow, on the point of limitation or any other, appear to be clearly distinguishable. If the proposition is true that, as regards titles created by the widow, the reversioner is allowed, by Article 141, twelve years from her death to bring his suit, I am unable to see how limitation can be affected by the fact of the alienee getting a decree against the widow. If she sells and gives possession, limitation does not run against the heir. If she refuses to give possession, and the vendee sues and gets a decree for possession, the vendee cannot be in a better position as regards limitation. In cases in which the alienation is proper, it binds the whole estate, but this is due to the nature of the widow's act. The heir is bound even at the date the transaction takes place. If adverse possession can be said to run in such cases, it must arise from the nature of the act, and not simply where the alienee has obtained a decree against the widow. Many such decrees do not bind the reversioners, and in such cases there is no adverse possession. In my opinion this ground also must fail.

The main point in the case is whether the plaintiffs are entitled to go behind the foreclosure decree of 1879. The law on the subject is well summarized by Mr. Mayne in the following passage. Where a suit is brought by or against a female heiress in possession in respect of any matter which strikes at the root of her title to the property, it is held that a decree, fairly and properly obtained against her, binds all the reversioners, because she "completely represents the estate," Hindu Law, 5th Edition, Section 605. Mr. Roy objects to the words

“fairly and properly,” and contends that such a decree is binding on the reversioners in the absence of fraud or collusion or except on special grounds, and that the authorities do not go farther. He quotes the *Shiva Ganga* case IX. M. I. A. 539, at page 604. The words “fair trial” occur in that very judgment, and the principles laid down in it have been adhered to ever since. See *Hari Nath Chatterjee v. Mathur Mohan Gowami*, I. L. R., XXI Calc., 8, at page 17; *Brommoye Dassee v. Kristo Mohun Mookerjee*, I. L. R., II Calc., 222; *Pertabnarain Singh v. Trilokinath Singh*, I. L. R., XI Calc., P. C., 186, at page 197; *Sant Kumar v. Deosaram*, I. L. R., VIII All., 365; *Punjab Record*, 8 of 1884 and 139 of 1888. Counsel tried to restrict the operation of the rule to cases of fraud and collusion, probably relying on the language of Mr. Justice Rivaz in No. 74 of 1895 at page 360. But Mr. Justice Rivaz was not laying down a comprehensive doctrine on the subject, but giving what he thought was the gist of the *Shiva Ganga* case. It seems to me that Mr. Mayne's summary is correct, and that Mr. Roy's contention cannot be accepted.

As regards the question on whom the *onus* of proof should lie to show whether the trial has been a full and fair one, the answer must depend upon circumstances. The widow's estate is ordinarily a limited one, and she represents the reversioners only in special cases. It would have to be shown, in the first instance, that the litigation was one in which the entire interest in the estate she held in possession was at stake, and then, in order to bind the reversioners, that she sufficiently protected their interests, and that there was a proper and fair inquiry. Once the *bonâ fide* character of the litigation is established, and that the widow contested the case properly, the result will bind her as well as those who succeed her. In a suit springing from the widow's own alienation it is rarely possible for her to protect the rights of the reversioners, for she cannot in any case challenge the validity of her act, and the Court would not be bound to go into any issue regarding it. In the present instance, however, it was possible for her, without denying the binding character of her mortgage, to contest the foreclosure suit on the ground that there was no proper notice served on her, or on any ground that vitiated the foreclosure proceedings. The mortgage is now admitted to have been made for necessity. The widow's act so far therefore binds the reversioners, and, if the foreclosure has properly taken place, their rights are extinct. The question,

whether there has been a fair and proper trial of the issues arising in that suit, is one which thus properly arises in this suit, but must be considered independently of the fact that the mortgage was validly made.

All discussion regarding the *onus* of proof is practically of little consequence in this suit, because there is no difficulty in deciding whether the decree in the foreclosure suit was a fair and proper one. In my opinion so far from the trial in that suit being fair and proper, there was no trial at all. The Court's procedure teems with irregularities. The widow, who was old and decrepit at the time, made no effort to protect the reversioners' rights, nor even her own, and the decree was passed without drawing any issues or making any inquiry. The record shows that the 5th June 1879 was fixed for settlement of issues, but by mistake a summons on a form for final disposal with partial corrections was issued. On the 5th Mussammat Sobhan did not appear, and the hearing was adjourned to the 16th in order that the proceedings under the Regulation might be examined. She appeared on the 7th and asked to be allowed to make her statement as she was very old. She was permitted to do so, and denied receipt of consideration, but admitted that she had got a notice in 1877. The case appears not to have been taken up on the 16th, and on the following date the widow put in her *jawab-dawa* which was to the same effect as her first statement, on which the presiding Judge passed a decree in favour of the then plaintiffs giving as his reasons that the day was fixed for evidence, but she had not any in readiness, and that *prima facie* plaintiffs' claim appeared to be good. Now, in fact the issues had never been drawn, and no date had been fixed for hearing of evidence. The Court was entirely under a misapprehension on these points. Mussammat Sobhan did not raise any defence in relation to the foreclosure proceedings, but she pleaded that she had been over-reached, and denied receipt of consideration, but this was not put in issue and enquired into. It can scarcely be said that the widow's conduct showed any consciousness of the duty she owed to the reversioners to protect their rights and in the absence of any statement made by her, from which the regularity of the foreclosure proceedings may be legitimately inferred, and further in consequence of the Court's failure to question her regarding them properly, and its haste and error in disposing of the suit, it cannot be said that there was any trial, much less a fair one, of the questions that arise in such a case, so as to bind the reversioners. The

widow whether from ignorance or old age entirely neglected the conduct of the suit. Her position with reference to the reversioners' interest in the estate held by her was like that of a trustee, and her failure and neglect to defend those interests render the decree valueless against the reversioners.

Mr. Roy admitted that gross neglect on her part would be tantamount to constructive fraud.

On the whole, I am of opinion that the decree of 1879 does not make the present claim *res judicata*. The respondents therefore must be relegated to the position of mortgagees, who have got a valid mortgage from the widow, and who have issued notice of foreclosure under the Regulation of 1806. It is open to them to show in this suit that the foreclosure proceedings were in due form, and that the right of redemption is extinct.

I think the *onus* of proving this issue is entirely on the respondents. The notices themselves have been destroyed, but this is a piece of misfortune which cannot be helped. No presumption can be made in favour of the regularity and propriety of the foreclosure proceedings. *Punjab Record*, 24 of 1895, page 97, 139 of 1882. Nor can I regard the oral evidence produced on remand as of any value whatever. Mussammat Sobhan no doubt in 1879 admitted having received a notice, but this was not enough. It was necessary to prove very much more before the right of redemption could be said to be extinguished. Neither the file of the notice proceedings, nor that of the foreclosure suit, show that the imperative conditions of the Regulation were fulfilled. For example, it is not shown that a demand previous to the application for issue of the notice was made, or that a copy of the application was served with the notice. I have no difficulty in finding on this issue in favour of the plaintiffs.

As regards estoppel there is no sufficient ground to hold it established against any of the plaintiffs. It is not shown that any of them was actually a tenant of the defendants when the suit was brought. It is true that most of them have cultivated the land under defendants off and on, but from this it cannot be inferred that they have foregone their rights of ownership. A suit was brought by the plaintiffs in 1887, which showed that defendants' title was not undisputed. The first Court which decided in favour of the defendants did not find estoppel proved, but was of opinion that from the plaintiffs' conduct

it could be inferred that they had in a manner sanctioned the widow's alienation. There is, however, no sufficient proof that the plaintiffs at any time accepted the widow's alienation as valid and binding on them. The plaintiffs are therefore entitled to redeem the land on payment of Rs. 360.

The respondents have held the land as ostensible owners since 1879, but the case of 1887 and some objections made at the time of mortgage ought to have warned them that their title was not beyond question. All things considered, however, I think the parties ought to bear their own costs throughout.

I would dismiss the appeal but without costs.

Appeal dismissed.

No. 30.

Before Mr. Justice Frizelle.

HAKIM AND OTHERS,—(PLAINTIFFS),—APPELLANTS,

*Versus*NADIM GUL AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

} APPELLATE SIDE.

Case No. 198 of 1898.

Civil Procedure Code, 1882, Section 43—Application to Revenue Officer for partition of land—Question of title decided by said officer—Subsequent suit for possession of house—Title to land and house identical—Punjab Land Revenue Act, 1887, Section 117.

In previous partition proceedings, relating to certain land and between the parties to the present suit, the Revenue Officer, before whom the proceedings were instituted, passed an order under Section 117 of the Land Revenue Act, to the effect that he would himself inquire into and determine the question of title that had been raised. Subsequently the present plaintiffs filed an application, upon which they paid the full stamp necessary for a civil suit, but which was not in the form of, or verified as, a plaint, and contained no statement of claim beyond a reference to the said order, and a statement that a separate suit would be brought for possession of a house connected with the land. The application was, however, registered in the register of civil suits, the order that it should be so registered and the summons issued being signed by the said officer, who was an Extra Assistant Commissioner, as "Munsif, 1st class." The officer then proceeded under Section 117 (2) (b) of the Land Revenue Act, and gave plaintiff a decree in respect of the land, the judgment being signed by him as "Assistant Collector," and the decree as "Munsif, 1st class." Plaintiffs having subsequently sued for possession of the house mentioned in their said application, defendants pleaded that the suit was barred under Section 43 of the Civil Procedure Code, on the ground that the decree in the partition proceedings had been passed by the Extra Assistant Commissioner, purely in the exercise of his civil powers as a Munsif, 1st class, and that therefore the claim to the house could have been made before him and determined in those proceedings. It was admitted that plaintiffs' title to the land and to the house was the same.

Held, that the Extra Assistant Commissioner had clearly intended in the partition proceedings to act under Section 117 (2) (b) of the Land Revenue Act, as a Revenue Officer, and that his jurisdiction was confined to the question of title to the land which alone was the subject of those proceedings.

Held, therefore, that inasmuch as no claim to the house could have been included in the former proceedings, the present suit was not barred under Section 43 of the Civil Procedure Code.

Further appeal from the order of H. Maude, Esquire, Divisional Judge, Peshawar Division, dated 16th June 1898.

Muhammad Shah Din, for appellants.

Janki Nath Kaul, for respondents.

The judgment of the Court was delivered by

17th Feby. 1898.

FRIZELLE, J.—The Divisional Judge has dismissed this suit under Section 43, Civil Procedure Code, on the ground that, in a partition proceeding previously pending between the parties, when a question of title was raised and inquired into, and decided, the claim to the house now in dispute should have been made. In that proceedings the first Court as a Revenue Officer, on 27th January 1896, passed an order that he would himself determine the question of title that had been raised. This order was passed under Section 117 of the Land Revenue Act, and the Revenue Officer then proceeded under sub-section 2 (b) of that section and gave a decree in plaintiffs' favour. That inquiry and decree only referred to the land, which was the subject of the partition proceedings, and did not include the house now in dispute. Plaintiffs' title to the land and the house is admittedly the same, but, in the partition case which the Revenue Officer tried as a Civil Court, no claim to the house could have been included. I therefore think the present suit is not barred by Section 43.

It is contended for respondents that this decree of the first Court was passed purely in the exercise of its civil powers as Munsif of the first class, and that therefore the claim to the house could have been then made and determined. From examination of the record, I find that, after the Revenue Officer (Lala Mangal Sain, Extra Assistant Commissioner) had passed his order under Section 117, plaintiffs filed an application referring to the previous order, and on this application full stamp was paid. This application was registered in the register of civil suits, and the order that it should be so registered and summons issued was signed by the Extra Assistant Commissioner as "Munsif, 1st class." He signed the judgment as Assistant Collector and the decree as Munsif, 1st class. But the officer was the same throughout. I think it was merely a mistake signing as Munsif. He clearly intended to act under sub-section (2) (b) as a Revenue Officer, merely observing the procedure laid down for Civil Courts, and his jurisdiction was confined to the question of title raised in the revenue proceedings, namely, the title to the land.

Although plaintiffs filed a separate application after the order of the 27th January, and the application was on the full stamp necessary for a civil suit, it was not in the form of a plaint, it was not verified as a plaint, it contained no statement of the claim beyond a reference to the order of 27th January,

and expressly stated that a separate suit would be brought for a house connected with the land, that is, the house now sued for.

I accept the appeal; set aside the Divisional Judge's order and remand the case to him for decision of the appeal on the merits. Stamp to be refunded. Other costs to be costs in the case.

Appeal allowed : cause remanded.

No. 31.

Before Mr. Justice Stogdon and Mr. Justice Chatterji.

MALIK RAHIM BAKHSI AND OTHERS,—

(DEFENDANTS),—PETITIONERS,

Versus

MUSSAMMAT FAKHAR-UN-NISA,—(PLAINTIFF),—
RESPONDENT.

MISCELLANEOUS
SIDE.

Case No. 269. of 1897.

Res judicata—Cross suits relating to same subject-matter, and involving identical issues tried together—Findings on issues in both judgments identical—Appeal from judgment in one case only—Civil Procedure Code, 1882, Section 13.

Where two cross suits, relating to the same subject-matter and giving rise to identical issues, are tried by the same Court, and it cannot be urged that there is a bar to the trial of the issues by the Court in either case, an Appellate Court is not precluded from adjudicating on those issues, if one judgment is appealed and the other is not, by the operation of the latter judgment under the rule of *res judicata*, though the findings on the issues in both judgments are identical.

I. L. R., XVI Calc., 233, followed; I. L. R., VI Calc., 319, not followed; I. L. R., XI All., 148, distinguished.

A decision on a point, which is decided, but which is not necessary for the decision of the suit, which is disposed of on another point, cannot operate as *res judicata*.

Where a plaintiff brought her own suit, in which the question of her right necessarily and directly arose, *held*, that she could not be held to have acquiesced in the same issue being treated as a material one in another suit, in the same Court, in which she was impleaded only as a member of the family, the two suits being tried together.

* *Application for review of the judgment of the Chief Court, dated 16th March 1897.*

K. P. Roy and Jaishi Ram, for petitioners.

* The judgment of which a review was prayed, is reported as No. 23, *Punjab Record, 1897.*—*Ed., Punjab Record.*

The petition for review of judgment was rejected by the following judgment delivered by

24th Feby. 1898.

CHATTERJI, J.—This is an application by Malik Rahim Bakhsh and Malik Kadir Bakhsh, two of the defendants-respondents, for review of a judgment, which has been published as No. 23 in the *Punjab Record* for 1897. All the points arising in the case were exhaustively considered in that judgment, and the review seeks to re-open almost every point decided in it. The learned argument for the petitioner took up the greater part of two days, and most of it was addressed to the question of *res judicata*, which was taken as a preliminary objection at the original hearing and overruled. This point must first be discussed and decided.

The facts upon which the contention is founded are set forth in the former judgment, and need not be recapitulated here. The substance of counsel's argument may be summarized as below.

1. That though the facts of *Abdul Majid v. Jew Narain Mehto* (I. L. R., XVI Cal., 233) are practically identical with those of the present case, the principle adopted by the Court that the bar of *res judicata* only applies to the trial of the issue by a Court of first instance, and not to its disposal by the Court of appeal, conflicts with that laid down by the Allahabad Court in *Balkishan v. Kishan Lal* (I. L. R., XI All., 148) which embodies the sounder doctrine, and is supported by the judgment of this Court in *Nur Muhammad v. Jamun*, No. 153, *Punjab Record*, 1890.

2. That it is immaterial whether the plaintiff could or could not appeal from the decree in Rahman Bakhsh's case, as the bar would equally apply in either case.

3. That the principle of *res judicata* should be liberally construed and applied, and that we should be guided by its spirit rather than the words of any judgment, interpreting the provisions of Section 13, Civil Procedure Code.

The authorities cited were almost exclusively those quoted at the original hearing.

I have given the arguments of the learned counsel my best consideration, but am unable to see that there is any such error in our former decision as necessitates a re-consideration of it. As pointed out in that order, the facts of the Allahabad case were very different from those of the present one, which makes the application of the doctrine it lays down to the latter a

matter of difficulty. On the other hand, the facts of the Calcutta case were almost identical, and it cannot be predicated with certainty that the principle enunciated by the Court had no reference to them. The Calcutta case is the only precedent, which can be said to be directly in point, while the Allahabad case is only an indirect authority. When a suit for rent of a particular year is brought, and a decision arrived at, on issues raised by the pleadings of the parties, it is easy to see that in a subsequent suit for rent of a subsequent year between the same parties the findings in the first suit of the last Court of Appeal on the material issues would be binding, and this has been scientifically explained by Mr. Justice Mahmud in *Balkishan v. Kishan Lal*. But where two cross suits relating to the same subject-matter and giving rise to identical issues are tried by the same Court, and it cannot be urged that there is a bar to the trial of the issues by the Court in either case, it is not quite so apparent that the Appellate Court would be precluded from adjudicating on those issues, if one judgment is appealed and the other is not, by the operation of the latter judgment under the rule of *res judicata*, though they may have both given the same findings on the issues.

Moreover, we should hesitate to apply arguments used in another case, which, though expressed in general terms, had possibly a special signification with reference to the facts of that case. I utterly repudiate the argument that the spirit of the rule of *res judicata* is in favour of the petitioners, and that in consequence we should look to that spirit in deciding the objection. The spirit of that rule has absolutely no application to the present case, and had I to decide the objection on general principles only, I should not have the slightest hesitation in rejecting it as wholly unfounded and unsustainable. The petitioners' sole hope lies in bringing their objection within the words of Section 13, Civil Procedure Code, and then in insisting on a *strictly literal* interpretation of them without regard to the consequences. If they succeed in this, we must of course give effect to the plain language of the section, even though it lays down a rule opposed to the true principles of *res judicata*, and therefore not presumably in the contemplation of the Legislature in enacting it.

It is admitted by Sir Whitley Stokes (II, Anglo-Indian Codes, 393) that the question of *res judicata* "is a subject the importance of which * * * is only equalled by the difficulty of dealing with it clearly, concisely and accurately in a

“legislative enactment.” In *Bhola Bhai v. Adhesang* (I. L. R., IX, Bom., 75) Mr. Justice West says: “Section 13 of the Code cannot be applied quite literally, as if it could, the Court trying a second suit would be bound by the decision of a point in a first suit treated by the Court in appeal as irrelevant for that case though not formally set aside. We must construe the section, if possible, so as to avoid an anomalous result * * .” Similar language was used by Mr. Justice Mahmud in *Sita Ram v. Amir Begam* (I. L. R., VIII All., 324) at page 334. He said that the section * * “had given legislative expression to one of those rules of law which are most difficult to formulate for purposes of codification,” and that “in interpreting the language of that section we cannot ignore the fundamental principles of the rule to which that section gives expression, unless indeed the express words of the statute clearly contradict those principles.”

In the case decided by the Allahabad Court, the decision of the material issue as to plaintiff's right to recover *malikana* in the second case, was bound to follow the decision of the same issue in previous suit under the express provisions of Section 13. There would have been no such question raised as was decided by the High Court, had the final decree of Mr. Justice Mahmud been passed in the first suit, before the trial of the issue in the second suit came on. The complications arose only because that decree was given after the decree of the first Court in the second case, and because the decrees of the intermediate Court of appeal were different from those of the first Court in both cases. Mr. Justice Mahmud in a lucid judgment showed that these complications did not affect the operation of the rule of *res judicata*, which would have applied, had the facts been as I have put above. But the important distinction remains that in that case the decision of the first Court would have had to follow the *final* decision in the previous case. Section 13 seems clearly to require, in order to constitute *res judicata*, that there should be a former suit and a final decision in that suit of the point that is subsequently raised. To refer again to the Allahabad case, suppose the decree of the subordinate Judge in the second suit had not been appealed, would the High Court have been bound to dismiss the appeal in the first case, on the ground that the matter was *res judicata* for this reason? I decidedly think not. Yet according to the argument of the reviewers' counsel, based on Mr. Justice Mahmud's reasoning, this would seem to follow.

In the Calcutta case, the decision in neither case was dependent upon the other in the Court of first instance, and I can find no flaw in the Court's reasoning that this state of things was not altered in the Court of Appeal. It is admitted that in the present instance also there was no bar to the trial of the issue regarding plaintiff's right in the Court of the District Judge.

The facts of the present case are stronger in favour of the plaintiff than those of the Calcutta precedent. There the plaintiff-appellant had undoubtedly a right of appeal from the decree passed against him for rent in the other case. But it is doubtful whether the present plaintiff had any right of appeal against the decree in Rahman Bakhsh's suit. I have stated the reasons for my doubt in my former order, and they do not require to be repeated here. There was, I conceive, no decree against the plaintiff, and no relief granted against her within the meaning of Section 206, Civil Procedure Code. She had no property in her hands which she could be, or was, ordered to deliver possession of or to partition, and no declaration was sought against her or granted by the decree. The definition of "decree" in Section 2, Civil Procedure Code, does not appear to militate against this view.

Petitioners' counsel did not attempt to show what the plaintiff's procedure in appeal would have been, but contended that it was immaterial whether she could or could not appeal, and that nevertheless the decision in Rahman Bakhsh's case made the question of her right *res judicata* between her and the reviewers. This contention is, in my opinion, monstrous, and can only be acceded to if it is clearly supported by authority. There does not appear to be any great weight of authority in favour of it. *Niamat Khan v. Phadu Baldia* (1. L. R., VI Calc., 319, F. B.) on which counsel's main reliance is placed, appears to be wrong, and is not supported by the precedents cited in it, and has been frequently dissented from. *Soorjomonee Dayee v. Suddanund Mohapatra* (12 B. L. R., 304, P. C.) which it professes to follow relates to a different point, viz., that where a question has been necessarily decided in effect though not in express terms between the parties, the matter becomes *res judicata* in a subsequent suit between them. Nor is the judgment of the Privy Council in *Krishna Behari Roy v. Banwari Lal Roy* (1. L. R., I Calc., 144) in point. The same remark applies to *Kirpa Ram v. Bhagwan Das*, which was also dissented from, if not overruled by their Lordships in *Krishna Behari Roy's* case. *Sheikh Enayat Ulla v. Sheikh Amir Bakhsh* (25, W. R., 225) related to the binding effect of a decision on a point on

which the case itself, in which it arose, was not decided, and is opposed to the latest decisions of almost all the superior Courts in India as well as the Privy Council.

On the other hand, the *ratio decidendi* of the following cases appears to be clearly against the argument that the plaintiff would be bound by the decision of a Court of first instance in which she had no right of appeal. *Bhola Bhai v. Adhesang* (I. L. R., IX Bom., 75) ; No. 20, *Punjab Record*, 1891, and *Braro Behari Mitter v. Kedar Nath Mozamdar* (I. L. R., XII Calc., 580), though the point actually decided in the first two cases was, while analogous, somewhat different. Mr. Justice West in *Bhola Bhai v. Adhesang* cites the opinion of the eminent German Jurist Savigny in support of the view which he evidently approves that "no matter decided by a lower Court "in which an appeal is excluded can be *res judicata* for any other "case either in the same or in any other Court," which is the rule obtaining in the continental countries of Europe (page 80). See also *Anusuya Bai v. Sakhoram Pandurang* (I. L. R., VII Bom., 464, at 467, 468) ; *Thakur Magan Deo v. Thakur Mahadeo Surj* (I. L. R., XVIII Calc., 647 at 651) supports the same view, and in the absence of clear authority to the contrary, I should be prepared to hold this opinion. In *Krishna Behari Roy's* case the question of adoption contested by the intervener was appealed and carried up to the High Court in the former suit.

Another principle ruled in *Niamat Khan v. Phadu Baldia* (I. L. R., VI Calc., 319, F. B.) was that when a point is decided but is not necessary for the decision of the suit which is disposed of on another point, the decision on the former point operates as *res judicata* between the parties. This was disapproved by a Full Bench of our Court in *Narain Das v. Faiz Shah* (No. 157, *Punjab Record*, 1889) following the dictum of their Lordships of the Privy Council in *Ran Bahadur Singh v. Luchu Koer* (I. L. R., XI Calc., 311, at page 310), and other precedents cited in the judgment. See also *Ghela Icharam v. Sankal Chand Jethu* (I. L. XV R., III Bom., 597). The Full Bench authority is binding on us, and in my opinion, has a most important bearing on the question before us. For I have always been inclined to take the view that the issue as to the daughter's right to inherit by custom was not a material one in the suit in which Rahman Bakhs was plaintiff.

The present reviewers were co-defendants with the plaintiff in that suit, but, before the finding on that issue can

operate as *res judicata* between them, it must be clearly shown that it necessarily arose between the reviewers and the then plaintiff, Rahman Bakhsh. Upon a careful analysis, however, of the plaint and pleadings in that suit, this does not appear to have been the case. Rahman Bakhsh's claim was based on two or perhaps three causes of action in the alternative. He wanted partition in accordance with award of the arbitrators appointed by himself and his brothers including the reviewers, all of them having agreed to the award. In so far as this claim was concerned, the daughters of Karim Bakhsh were not necessary parties, as the award could be enforced against all who were parties to the arbitration without reference to the daughters' rights. Their rights could not be set up as a defence by any of those persons in such a suit, and as a matter of fact the petitioners for review never set them up or objected to the claim under the award, except on certain minor points, which are immaterial for purposes of the question we are considering. Subject to the disposal of these points, Rahman Bakhsh could get a decree in accordance with the award on the pleadings of the reviewers, and no issue as to the daughters' rights arose between them on that basis of claim. Rahman Bakhsh, however, impleaded the present plaintiff as a possible heir of his father, and in order to have the partition effected in the presence of all who had any claim to Karim Bakhsh's property, and particularly, I apprehend, with reference to his other causes of action in case the award was held not to be binding. In that case he claimed a fourth share if the daughters of his father were excluded by custom, if not, his proper share under Muhammadan law. There was some movable property not covered by the award, but of value infinitesimally small in comparison with that included in the award, and to this the latter alternatives alone applied. But inasmuch as the daughters had no property whatever in their possession, it was not necessary to implead them, though it was doubtless convenient to do so, and the issue as to their right did not also necessarily arise in those causes of action upon the pleadings of the present petitioners. They, of course, denied the daughters' right, but were willing on that basis to give the plaintiff his one-fourth share, which was also the share given to him by the arbitrators' award. There is no trace in their pleadings of any denial of his right, if the award failed, to such a share, which he was bound to get if the daughters were excluded, as they alleged, by custom. Nor, I apprehend, would they have any objection if plaintiff on

the basis of Muhammadan law was content to take a seventh share in place of one-fourth. They might have denied the daughters' rights on the grounds on which plaintiff reduced his claim, but the Court would not have been bound to frame and decide an issue as to the daughters' rights, as a decree could have been passed in plaintiff's favour for a share less than what he was entitled to on defendants' own showing without going into that question.

The above reasoning appears to me to be correct, considered strictly from the standpoint of *res judicata* with reference to the question decided by the Full Bench in No. 157 of 1889. That the suit of Rahman Bakhsh was a suit for partition of family property is doubtless true, and that in such cases members of the family, who are potentially sharers, are proper parties, may also be conceded. It is certainly convenient and saves trouble, and probably further litigation, if such procedure is adopted, but under the circumstances the suit of Rahman Bakhsh could have clearly proceeded without impleading the present plaintiff, and he could have obtained all the reliefs he claimed without her joinder, subject only to her right to come in and litigate with him regarding her rights whenever she chose.

Even if we assume that she was properly made a party, and that the issue as to her rights was a material one, if Rahman Bakhsh's suit stood by itself, the contention cannot hold when we find that she herself filed a suit in which the question directly and necessarily arose, before the other case was tried. It may possibly be that where the parties upon their pleadings go into a case, and have all the issues tried and decided, they are bound by those findings, where each of them is sufficient to dispose of the case without reference to the logical order in which the issues are necessary, as was ruled in *Piary Mohan Mukerjee v. Ambica Churn Bandopadhyaya* (I. L. R., XXIV Cal., 900). I give no opinion on this question. But where, as in the present instance, the plaintiff has brought her own suit, in which the question of her right directly and necessarily arises, she cannot be held to have acquiesced in the same issue having been treated as a material one in another suit, in which she is only impleaded as a member of the family, the two suits being tried together. Surely the logical order of treatment is to hold the issue as materially and primarily arising in her own suit, and to decide that issue in the other case, if it is considered proper to draw it at all, in accordance

with the decision in her suit. I have tried to show that it is not absolutely necessary in that case. *A fortiori* it is not so when there is a contemporaneous suit by the plaintiff herself.

Lastly, if stress is laid on the necessity of plaintiff's joinder, and of the issue regarding her right in Rahman Bakhsh's suit on the ground that it was a partition suit, and this is conceded to the petitioners, the right view to take would be to regard the two suits as one, as they undoubtedly are in substance, and to hold that a single appeal is sufficient to bring the question of her right properly before the Court of Appeal. Plaintiff's suit is also for partition and possession of her share, and all members of the family are parties to it. Both cases have been heard and tried together. This appears to me to be a sufficient answer by itself to the contention of the reviewers. In fact the contention has all along appeared to me to be an absurd one, without any foundation in law or reason.

I would accordingly overrule it.

As regards the merits of our decision, I do not think any detailed remarks are required. The case has been very fully gone into, and it is not a sufficient ground for re-opening it that the petitioners think we ought to have come to different findings on the questions decided. No obvious or material errors vitiating the findings are shown, and it is too much for them to expect that we should go over the whole ground again, merely because our judgment does not satisfy them. One or two mistakes in appreciating the evidence bearing on one or two of the instances cited as to custom were alleged in the argument, but they are very trivial, even if they are made out, which is not at all clear, and do not affect our findings regarding those instances. As regards the *onus* of proof, we ourselves came to a conclusion with some hesitation, as the matter was one of some difficulty, but all that petitioners now urge was fully borne in mind and considered by us. It is useless to quote decisions under Hindu law about emigrants being presumed to retain their customs and their peculiar law in their new domicile. Hindus ordinarily retain their social and religious customs, their priests and gods and their mode of living, wherever they go, but the same cannot be predicated of Muhammadans. In this case the parties have been found by us to be Arains, but they did not hold land on a tribal tenure as they generally do in Punjab Proper, and the presumption of their following their tribal customs as agriculturists, and of

excluding daughters from succession, have naturally a very feeble application. They founded no village and did not hold land as a village community of Arains. On the contrary, they settled in the suburb of a town, which was long a focus of Islamism, many generations ago among a heterogeneous community of Muhammadans, with whom they intermarried and formed ties of brotherhood, and did their best in the past to conceal their true origin by pretending orthodoxy and trying to make it appear that they were Sheikhs, Koreishi or Sidiqui. Having regard to all these circumstances and to the fact that they have been shown to hold land only for two generations, we found, after giving full weight to all considerations that tell in their favour, that there was no presumption in favour of the custom they allege, and left the question an open one. They had therefore to establish the custom, and we held that they had failed to do so. I am unable to see any impropriety or error in our decision.

No other point in the application for review requires separate notice. Relief has been given to the petitioners in respect of their complaints in their 27th, 28th and 29th grounds by amendment of our decree, under Section 206, Civil Procedure Code.

I would accordingly reject this application.

Application dismissed.

No. 32.

Before Sir Charles Roe, Kt., Chief Judge, and Mr. Justice Chatterji.

PIR BAKHSH,—(PLAINTIFF),—APPELLANT,

Versus

KADIR BAKHSH,—(DEFENDANT),—RESPONDENT.

Case No. 565 of 1896.

APPELLATE SIDE. {

Lis pendens—Registered and unregistered deeds—Registration Act, 1877, Section 50.

Section 50 of the Registration Act, 1877, gives priority to registered documents of certain specified classes, as regards property comprised therein, over unregistered documents relating to the same property, not being decrees or orders, provided, in the latter case, that such decrees or orders are prior in point of date to the registered document.

Where, however, an unregistered mortgage had already brought his suit to enforce his mortgage, held, that a mortgage, by registered deed, of the same property made during the litigation must, in accordance

with the principles of *lis pendens*, be treated as subject to the result of the suit.

Further appeal from the order of Colonel C. H. T. Marshall, Divisional Judge, Lahore Division, dated 17th December 1895.

Sham Lal, for appellant.

Sant Ram, for respondent.

The judgment of the Court was as follows:—

CHATTERJI, J.—The material facts of this case are shortly **13th April 1898.** these. On 17th May 1889, Imam-ud-din mortgaged two plots of land measuring 3 *kanals* each at Rajgarh to the defendant Kadir Bakhsh by two deeds, one for Rs. 69, and the other for Rs. 99. Both deeds were unregistered and the mortgages were with possession. Neither deed contains any *khasra* numbers or any specification of the mortgaged lands beyond describing them as *bagh*.

On 23rd November 1891, Kadir Bakhsh sued Imam-ud-din for recovery of the mortgage money with a declaration of lien over the mortgaged property. On 26th November notice was ordered to issue and the case was fixed for the 15th December. On the 16th, the presiding officer of the Court noted that the plaintiff was present but the defendant was not, but as he himself was ill, changed the date of hearing to the 15th January 1892, and directed that the defendant should be informed. The case was again put off to the 11th February, but ultimately came on for hearing on 24th March when, on defendant's confession, a decree was passed in favour of the plaintiff for Rs. 168, with the declaration of lien prayed for in the plaint.

On 9th January 1892, while the above suit was pending, Imam-ud-din sold 27 *kanals* 7 *marlas* of land, comprising various *khasra* Nos. for Rs. 800, to the plaintiff by a registered deed.

Kadir Bakhsh in execution of decree attached his judgment-debtor's land including the 6 *kanals* in dispute in appeal. This led to an objection on the part of the plaintiff and finally to this suit, which is for a declaration that 13 *kanals* of land, *khasra* No. 839, included in his purchase, are not liable to attachment and sale at the instance of the decree-holder. Though Kadir Bakhsh's deeds contain no specification of the land under mortgage, there is now no dispute that the 6 *kanals* are included in plaintiff's deed and form part of the 13 *kanals* for which the present suit is brought.

The plaintiff's deed is registered while Kadir Bakhsh's deeds are not, and there is clearly a competition between these deeds. Under Section 50 of the Registration Act, the plaintiff's deed would have priority on this ground. It is true that Kadir Bakhsh has got a decree, but it was obtained subsequently to plaintiff's sale, and only gives effect to mortgages which, by the above section, must be postponed to it. *Himalaya Bank, Limited, v. Simla Bank, Limited.* (I. L. R., VIII All., 23, F. B.); *Jagrup Rai v. Radhey Singh* (I. L. R., XIII All., 288). On this ground plaintiff appears to have a right to succeed, which both the lower Courts have erroneously failed to see.

There is, however, one defect in the plaintiff's title, which is in our opinion fatal to his claim despite his priority on the ground of registration. It appears from the dates above given that the transfer in his favour was made *pendente lite*, and that in consequence his title is subject to the result of the suit. *Lis pendens* begins when summons has been served on the defendant. Now, though the file containing the summonses has been destroyed, it appears clear to us that defendant was served before the hearing on the 15th December 1891, though he was absent. Had he not been, the wording of the order of adjournment would have been different. It would have been mentioned that the summons had not been served and fresh ones ordered to issue. That the Munsif did not proceed *ex parte* on that date was probably due to his inability to take up the case owing to illness. We, therefore, hold that service had taken place before the 9th of January, and that there was a *litis contestatio* in respect of the 6 *kanals* mortgaged to Kadir Bakhsh when they, in conjunction with other land, were sold to the plaintiff.

The Registration Act, Section 50, gives to registered documents of certain specified classes priority as regards property comprised therein over unregistered documents relating to the same property, not being a decree or order. The words of the section indicate, and it has been ruled, that the decree must be prior in point of date to the registered instrument. *Himalaya Bank, Limited, v. Simla Bank, Limited* (I. L. R., VIII All., 23, F. B.), see also *Jagrup Rai v. Radhey Singh* (I. L. R., XIII All., 288, and No. 125, *Punjab Record*, 1889). But where as in this case, the unregistered mortgagee has already brought his suit to enforce his mortgage, a transfer by a registered deed during the litigation ought to be treated as

subject to result of the suit. This would be in accordance with the principles of *lis pendens* and there is nothing in Section 50 to take out of the operation of those principles a registered deed executed under the circumstances above stated. In case of *Baij Nath v. Luchman Das* (I. L. R., VII All., 888) a subsequent decree was preferred, though the facts were not quite analogous. The case may be held to have been partially overruled by the Full Bench case reported in the 8th volume of the Allahabad series, but no authority in direct conflict with the principles we have enunciated has been quoted to us, and we think our view is to some extent supported by the reasoning used in the former case. There is nothing opposed to it in *Keshav Pandurang v. Vinayak Hari* (I. L. R., XVIII Bom., 355).

We are accordingly of opinion, though on grounds somewhat different from those adduced by the lower Courts, that the plaintiff is not entitled to priority.

The appeal is dismissed, but, under the peculiar circumstances of the case, we direct that the parties pay their own costs throughout.

Appeal dismissed.

No. 33.

Before Mr. Justice Reid and Mr. Justice Clark.

GANGA SINGH AND ANOTHER,—(DEFENDANTS),—
APPELLANTS,

Versus

MU SSAMMAT SHIB DEVI,—(PLAINTIFF),—
RESPONDENT.

} APPELLATE SIDE.

Case No. 506 of 1896.

Monthly tenancy—Transfer of Property Act, Section 106—Tenant holding over—Damages.

Where a tenancy of certain shops was not for agricultural or manufacturing purposes, and the tenant failed to prove a contract for a lease from year to year, held, on the principle laid down in Section 106 of the Transfer of Property Act, that the tenancy was monthly, and that a notice of 15 days, terminating with a month of the tenancy, was valid.

Held, further, that the damages awardable by the Court against a monthly tenant who wilfully and contumaciously holds over, after notice, should be reasonable in amount.

Further appeal from the order of J. G. M. Rennie, Esquire, Divisional Judge, Rawalpindi Division, dated 8th February 1896.

Ishwar Das, for appellants.

Duni Chand, for respondent.

The following judgment was delivered by

25th April 1898.

REID, J.—We are satisfied that the tenancy of the shops in respect of which this suit was filed, was monthly, and that the notice of 15 days, terminating with a month of the tenancy, was valid. The fact that the shops had been let to a liquor contractor, who had a yearly contract for the sale of liquor, does not affect the landlord. The tenancy was not for agricultural or manufacturing purposes, and the rule contained in Section 106 of the Transfer of Property Act is applicable, the tenant having failed to prove a contract for a lease from year to year. The question remains what damages in lieu of rent the landlord is entitled to, for the period during which the tenant held over, after expiry of notice.

In England this question has been settled by Statute 4, George II, cap. 28, Section 1, providing that the tenant shall pay double the yearly value of the premises.

The pleader for the appellants relies on *Kylash Chunder Sircar v. Woomanund Roy* (XXIV W. R., 412), and *Budun Mollah v. K. N. Chatterjee* (Ib. 441) for the proposition that reasonable damages for the holding over should be fixed by the Court and *Tejendro Narain Singh v. Bakai, Singh* (I. L. R., XXII Calc. 658) is in his favour.

Counsel for the respondent contends that, if Rs. 1,000 *per mensem* had been specified in the notice as the rent payable, if the tenant held over, the whole would be recoverable, and relies on an unreported ruling of this Court, Civil Appeal 195 of 1897.

In that case the occupant was mortgagee, paying no rent. The purchaser of the equity of redemption paid off the mortgagee and gave him notice that, if he held over after a certain date, Rs. 30 *per mensem* would be payable.

The learned Chief Judge held that, after expiry of reasonable notice, the mortgagee "must pay what plaintiff distinctly told him would be the end, if he continued to occupy the shop, *viz.* Rs. 30 *per mensem*."

The rent fixed for the shops in suit was originally Rs. 7-8 and it appears that the respondent was willing to accept Rs. 15, after issuing notice, but that the appellants declined to pay so much.

Under the English Statute it has been ruled that the penalty is recoverable only in case of a wilful and contumacious holding over, after notice, and not on a holding over under a *bonâ fide* claim of title or right, though erroneous.

We are satisfied that the holding over in the case before us was wilful and contumacious.

In the case before the learned Chief Judge it appears that the plaintiff paid Rs. 15 *per mensem* for a similar shop, the rent charged being therefore double the ordinary rent. It was unnecessary to consider whether rent, several times that ordinarily paid, would be recoverable, if charged in the notice to quit.

The rule laid down in the *Weekly Reporter* cases is equitable, and, applying that rule, we hold that the English Statute is a fair guide to the damages to be assessed in the case before us.

We modify the decree of the Court below, reducing the decree for the months of June and July, from Rs. 60 to Rs. 30. In other respects the decree of the lower Appellate Court will stand. The parties will pay their own costs of this appeal.

Decree modified.

No. 34.

Before Mr. Justice Reid and Mr. Justice Clark.

H. H. RAJA OF FARIDKOTE,—(PLAINTIFFS),—
APPELLANT,

Versus

SARDAR GURDYAL SINGH,—(DEFENDANT),—
RESPONDENT.

} APPELLATE SIDE.

Case No. 362 of 1896.

Limitation Act, 1877, Sections 10, 14—"Vested in trust"—Suit for recovery of money misappropriated by Khazanchi of Native State—"Defect of jurisdiction or other like cause"—Suit based on void judgment of foreign Court.

Section 10 of the Limitation Act, 1877, has a limited application, and does not cover a suit brought against the *khazanchi* of a Native State to recover money said to have been misappropriated by him from the money in his charge, such money not being "vested in trust for any specific purpose," within the meaning of the said section.

Neglect or laches of the plaintiff either in stating his case or prosecuting his suit is not "a defect of jurisdiction or other cause of a like nature," within the meaning of Section 14 of the said Act, and the inability of the Court to entertain the suit must arise from either some unavoidable circumstance over which no one has any control, or something incidental to the Court itself, and unconnected with the acts of the parties.

Where, therefore, a plaintiff sued in a Court of competent jurisdiction, but based his suit on a foreign judgment which was a mere nullity, *held*,

that he was not entitled to any deduction of time, under Section 14 of the Act, by reason of such suit.

First appeal from the order of Colonel C. H. T. Marshall, Divisional Judge, Lahore Division, dated 27th January 1896.

W. H. Rattigan, Q. C., and Muhammad Shah Din, for appellant.

K. P. Roy and Ishwar Das, for respondents.

The judgment of the Court was delivered by

18th April 1898. CLARK, J.—The facts of this case may be briefly stated. Sardar Bir Singh; father of defendant, was *bakhshi* of the Faridkote State, from 1869 to about April 1874, he then left the Faridkote State, and went to live in the Jind State.

On 14th April 1877, the Faridkote State filed two suits against Sardar Bir Singh in the Faridkote Courts and obtained *ex-parte* decrees on 8th November 1879 for Rs. 67,282, and on 25th January 1880 for Rs. 18,044.

On the former foreign decree the Faridkote State on 10th November 1881 filed a suit in the Court of Mr. Parker, Judicial Assistant Commissioner, Lahore, for Rs. 67,282. The suit was dismissed on 24th February 1882, on the ground, *inter alia*, that the Faridkote Court had no jurisdiction to pass the decree. Plaintiff's appeal to the Additional Commissioner was dismissed on 29th August 1882, his appeal to the Chief Court was accepted on 24th July 1888 and the claim decreed. (*Punjab Record*, No. 191 of 1888). On appeal to the Privy Council on 28th July 1894, the decree of the Chief Court was reversed, and the decree of the lower Court restored (*Punjab Record*, No. 112 of 1894). The present suit was then filed on 16th March 1895 on the original cause of action.

The Divisional Judge, Lahore, has dismissed the suit as barred by limitation, he held that Sardar Bir Singh held the position of Prime Minister of the State, that there was no evidence to show that he ever personally took over charge of the treasury or treasure, that he exercised a general control and supervision with his other numerous duties over the treasury offices and the treasurer, that he was not a trustee, and that Section 10 of the Limitation Act did not apply, that the suit was governed by Articles 90 and 91 of Act IX of 1871, and was barred.

Plaintiff appeals to this Court, and the first question raised is whether Section 10 of the Limitation Act (Act XV of 1877) applies.

To determine this it became necessary to consider Sardar Bir Singh's position in the State with reference to the treasury.

The question then arose whether plaintiff could rely on the evidence given in the Faridkote Court.

We hold that the consent of counsel to accept the previous record in this case so far as it was relevant to the present case (page 4, paper book) must be construed strictly, and only to refer to such evidence as was relevant and admissible.

We held that the statements of deceased witnesses recorded in the Faridkote Court were not admissible, as that Court was without jurisdiction and the statements were made *coram non jure*.

We now proceed to consider the position of Sardar Bir Singh, as it appears from the evidence on the file. We note that the witnesses are subjects of the Faridkote State, and that their evidence must be accepted with reserve, where it is against defendant.

We think it is clearly established that Sardar Bir Singh was the Raja's right-hand man and certainly not exclusively in charge of the treasury.

It is argued that he kept one of the keys of the treasury and either himself or by one of his personal subordinates wrote up the accounts.

The most important witness is Dula Mal, he was one of the two treasurers in charge of the treasury from 1869 to 1874, the Faridkote decree was also against him, he admits having joined with Sardar Bir Singh and others in misappropriating Rs. 21,000 from the treasury, he was imprisoned, but Sardar Bir Singh continued in office, and was not held responsible.

This witness therefore is not a credible one against defendant. It is he who says that Sardar Bir Singh had one of the keys of the treasury, and that he kept an account book of the treasury accounts.

He says daily balances were struck and money counted for about eight months, after that no balances were struck; he says Sardar Bir Singh's predecessor Bakhshullah Khan kept no accounts. When the *bakshi* sent for money without a voucher one of his orderlies used to come. The Raja's orders for money all came through *Bakhshi* Bir Singh. Occasionally he gave orders himself to pay small sums of Rs. 10 or Rs. 20.

It is evident then that the treasury business was managed in a most primitive fashion. Great reliance is placed on the book in Bir Singh's own handwriting, which, it is alleged, shows and works out a balance of Rs. 82,260 on 1st *Magh*, *Sambat* 1927, and which balance is alleged to have been tampered with and altered to Rs. 302 to correspond with the money in the treasury. We do not feel satisfied that this is the official treasury book kept up in the regular way of business. It may have been an incomplete record kept up by Bir Singh for his own information, and may not have been fully written up.

We are not satisfied that only Bir Singh's orders on the treasury were honoured. The Raja or the Tikkaji may have been able to give orders on the treasury.

Dula Mal and Maula may have been able to misappropriate money without the knowledge and connivance of Bir Singh, as they apparently did on one occasion.

We do not think it is shown that the treasury money was in Bir Singh's custody to such an unreserved extent that he can be considered a trustee of the money.

Just as the Raja himself by inattention to business was liable to have defalcations in his treasury, so was Bir Singh, and it is not necessary that he must have been a party to such defalcation.

However, supposing that his service in the State involved the receipt and custody of moneys of the State to be accounted for by him to the State, and that he did misappropriate portion of such moneys, is a suit to recover such moneys within Section 10, Act XV of 1877.

We note here that the letter of 8th April 1877 from the Faridkote State to Bir Singh, the first letter we have on the file, though there appear to have been previous letters, says that there is a difference of Rs. 61,684 in the treasury books, to the expenditure of which the papers furnish no clue, and asks Bir Singh to settle up the account, and the original action was brought to recover moneys alleged not to have been duly accounted for, and to have been misappropriated. Dula Mal and Maula were sued along with Bir Singh, and the Court was asked to award the amount from any of them who may be proved to be liable.

Section 10, Act XV, 1877, says: "No suit against a person "in whom property has become vested in trust for any specific "purpose, or against his legal representatives or assigns (not "being assigns for valuable consideration) for the purpose of

“following in his or their hands such property, shall be barred
“by any length of time.”

Starling in his work on the Indian Limitation Act under this section points out:—

Two circumstances must concur to bring this section into operation—1, property must have vested in some person as a trustee for a specific purpose; 2, the suit must be brought to follow the trust property.

Vesting implies that some one has an estate in the subject-matter of the alleged trust, not merely that he has power to charge it or direct how it should be disposed of (*Dickenson v. Teasdale*, 1 De G. J. and S. 52, *Coverdale v. Charlton* 42, Q. B. D., 120), consequently Directors of a Company are not persons in whom the property of the Company vests under this Section (*I. L. R., XVIII Bom.*, 119), nor is a liquidator of a Company. The particular words in this section “in whom property has become vested in trust for a specific purpose” render inapplicable many of the English decisions as to Directors and others being express trustees of money over which they have control.

The cases relied upon by plaintiff are—(1) *Burdick v. Garrick, L. R., V Chancery Appeals*, 233.

The head note runs—

“An agent who stands in a fiduciary relation to his principal cannot set up the Statute of Limitations in bar of a suit for an account by his principal.

“An agent, who was a solicitor in London, held a power-of-attorney from his principal in America, to sell his property and invest the proceeds in his name. The agent received certain moneys under the power and paid them into his own bankers to the general account of his firm. The principal died in 1859 intestate. In 1867 his widow took out administration to his estate, and in 1868 she filed a bill against the agent for an account.

“Held, that the agent held the money in trust for his principal, and therefore the Statute of Limitation was no bar to the suit.”

The money was held by the solicitor there on quite a different footing from that on which Bir Singh held the money.

Reliance is specially placed on the remarks of Lord Hatherley, on pages 238—240, and of Sir G. M. Giffard, on page 243, but we think that the remarks must be referred back to

the facts of the particular cases in order to properly understand them, and that this case is not a good authority for giving plaintiff the benefit of Section 10.

(2). *I. L. R.*, *IV All.*, 189.—This case seems against plaintiff. Section 10 was held not to apply, as it had reference to express trustees, and that it must be shown that the rightful owner has entrusted the property to the person alleged to be a trustee for the discharge of a particular obligation.

(3). *Law Reports*, 34, *Chancery Division*, 462.—This was a case between solicitor and client, and on facts entirely dissimilar to those of the present case.

(4). 1, *Bengal Law Reports*, 11 *short cases*.—This was a case of master and servant, sums had been advanced to the servant for building purposes, and it was held "that the matter partook of the nature of a trust to which no limitation "will apply." The judgment is only a few lines and the facts are not fully stated.

(5). *I. L. R.*, *II All.*, 361.—Starling on pages 49 and 51, Limitation Act, 3rd Edition, refers to this case, he says: "In order, therefore, in this country to bring a case under this section there must be evidence that a trust has been created for some specific purpose, and that property has become vested in a trustee for the purpose of carrying that purpose into effect."

"There is only one case in which any of the Courts in India have acted on a different principle, and that was what "is called a hard case," he then refers to this case, *II All.*, 361, and says, the Allahabad Court has, subsequently not approving of this case, agreed in principle with all the others (*I. L. R.*, *V All.*, 608).

(6). *I. L. R.*, *XI Mad.*, 274.—This is the most favourable case quoted for plaintiff. The *dharamkarta* of a temple, who has charge of the funds of the temple for the purpose of applying them to temple purposes, is a person in whom funds have become vested for a specific purpose, and any portion of such funds which have come into his hands and been misappropriated by him may be followed without limit as to time.

However, the position of a *khazanchi* both with reference to his application of and to the vesting of the funds in his charge is different from that of a *dharamkarta*.

(7). *I. L. R.*, *XVII Calc.*, 621.—"One T.C., in anticipation of death handed over his property to the defendant, his brother,

“and verbally directed him to pay certain specified debts and to apply the surplus for the necessities and support of his family. Held, that a good trust was created at any rate so far as the debts were concerned.”

The facts here are so different that we fail to see how the case gives any support to plaintiff's contention.

(8). *L. R.*, Q.B., 1893, page 390.—A trust fund was entrusted by the trustees to a *solicitor employed by them as solicitor to the trust*, held that he must be considered as having been in the position of an express trustee of such money, and therefore the lapse of time did not act as a bar to an action against him for the money.

We are referred to the *dicta* of Lords Esher and Bowen, on pages 394 and 397. We think it is right for us to consider these *dicta* along with facts of the case then before the learned Judges.

Those facts are so different from the facts of the present case that they render that case of no use to us as a guide.

For defendant the following cases have been quoted :—

(1). *I. L. R.*, IV *Calc.*, 455, where it was held that the language of Section 10 is specially framed so as to exclude implied trusts or such trusts as the law would infer merely from the existence of particular facts or fiduciary relations.

Mr. J. Markby on page 469 says : “The relation between the defendant and the heirs was undoubtedly a fiduciary one, and therefore in a very general sense of the word defendant might be called a trustee. I do not think the 10th Section of the Act was intended to comprise all fiduciary relations whatsoever. The position of agents, factors and managers, and *benamidars* may be, and generally is, a fiduciary one, but agents and factors are specially provided for in other parts of the Act, and *benamidars* are expressly declared not to be trustees.”

(2). *I. L. R.*, IV *Calc.*, 897, where it was held that the words “in trust for a specific purpose” are intended to apply to trust created for some defined or particular purpose or object as distinguished from trusts of a general nature, such as the law impresses on executors and others who hold recognized fiduciary positions.

(3). *I. L. R.*, V *Calc.*, 910; IV *All.* 187; XV *Calc.* 161; XX *Calc.*, 51; VIII *Calc.*, 788; XI *A.*, 90; and *Punjab Record* No. 84 of 1891.

The learned counsel for plaintiff in construing Section 10 would hold that the word "vested" means only "held in possession" (*I. L. R.*, *IV Cal.*, 468) that the words "in trust for a specific purpose" would cover any case where money was held for the benefit of the creator of the trust, that in this case it was sufficient that the money was held for the benefit of the Faridkote State, that the words "for the purpose of following such property" in the case of cash give the right to sue for money without reference to the particular property (*L. R.*, *X I. A.*, 96).

The effect of such construction would be that any person who entrusted money to another for his own uses, could, after the lapse of any time, bring a money suit against him or his representative.

This would, in our opinion, be opposed to the principles on which the law of limitation is based. It would render a large number of the Articles of Schedule II of the Limitation Act meaningless (*e. g.*, Articles 60, 62, 89, 90, 98, 100, 105, 133, 134, 145) as under the section so construed suits under these articles would not be barred by any length of time.

In our opinion Section 10 has a limited application, and does not cover a suit brought against a *khazanahi* to recover money said to have been misappropriated by him from the money in his charge. Such money was not "vested in trust for any specific purpose" with the *khazanahi*. We therefore hold that Section 10 of the Limitation Act does not apply to this case.

The next question is whether plaintiff's claim is within limitation by reason of any deductions to which he is entitled.

The first deduction claimed is under Section 13 on the ground that Sardar Bir Singh was absent from British India till the date of his death, the 2nd September 1887. We are disposed to think that plaintiff is entitled to this deduction, and as we hold that even with this deduction the claim is barred, we proceed on the assumption that plaintiff is entitled to deduct the period up to 2nd September 1887.

It was at first argued that the period of limitation applicable to the suit was six years under Article 120, and that plaintiff was entitled to deduct the period during which he was suing in the Faridkote Court, from 14th April 1877 to 8th November 1879, and add it on to the 2nd September 1887. The argument was obviously unsustainable, as the period 14th April 1877 to 8th November 1879 has already been allowed in the deduction up to the 2nd September 1887, and cannot be allowed twice over. The argument was not pressed.

It becomes unnecessary therefore to determine under which article the suit falls ; if it does not fall under some special article it falls under Article 120, and whether the limitation is three years or six years is immaterial, as both periods stand on the same footing.

This suit was instituted on 16th March 1895, and allowing plaintiff the most favourable article, it should have been instituted on 2nd September 1893, unless he is entitled to some deduction.

Plaintiff under Section 14 claims to deduct the whole period from 10th November 1881 to 28th July 1894, during which the case was pending in British Courts up to the decision of the Privy Council.

Passing over objections taken by defendant that the present defendant only came on to the record in 1887, and that the cause of action is not the same in the two suits, we proceed to consider the words, " in a Court which from defect of jurisdiction or other cause of a like nature is unable to entertain " the previous civil proceeding, for the meaning of these words will be sufficient for the disposal of the claim to this deduction.

Obviously the British Courts had jurisdiction to try the suit, there was no " defect of jurisdiction." Plaintiff elected to sue or made a mistake of law and sued on a foreign judgment instead of on his original cause of action. The foreign judgment was a mere nullity, and the document on which plaintiff relied was useless, and so his suit was dismissed.

The case would not have been different if plaintiff had been suing on an instrument, and his suit had been dismissed for defect of stamp or registration of the instrument. Can it be said that it was from a " cause of like nature " to defect of jurisdiction that the Court was unable to entertain the suit ?

For plaintiff it is urged that the dismissal of the suit by the Lahore Court, because the Faridkote Court had no jurisdiction, is of a like nature to the Lahore Court itself having no jurisdiction.

Plaintiff relies upon the following authorities :—

I. L. R., X *Calc.*, 86 ; *XIII Mad.*, 451 ; and *Punjab Record*, 59 of 1884.

Defendant relies upon the following authorities :—

I. L. R., X *All.*, 587 ; *XII All.*, 207 ; *II All.*, 622 *W. R.*, 1864, 371 ; *Punjab Record*, No. 19 of 1888 and No. 45 of 1893.

We have considered these authorities, we agree with what is said in 6 *W. R.*, 184, that any neglect or laches of the plaintiff in either stating his case or prosecuting his suit is not a defect of jurisdiction or other cause of a like nature. The inability of the Court to entertain the suit must arise from either some unavoidable circumstance over which no one has any control, or something incidental to the Court itself and unconnected with the acts of the parties.

We do not think that plaintiff's suing in a Court of competent jurisdiction by mistake on a foreign judgment, which was a mere nullity, can be held to be a cause of like nature to a defect of jurisdiction in the Court to entertain the suit.

In the end of his address counsel for plaintiff quoted *I. L. R.*, XIX *All.*, 348, but in that case the ruling was that Section 14 applied to a case where a plaintiff has been prosecuting his suit in a wrong Court in consequence of a *bonâ fide* mistake of law.

The case is inapplicable as plaintiff was not here prosecuting his case in a wrong Court.

We hold therefore that plaintiff is not entitled to deduct the period spent by him in suing in the British Courts, and that the suit is barred by limitation. We dismiss the appeal with costs.

Appeal dismissed.

No. 35.

Before Mr. Justice Chatterji and Mr. Justice Gordon Walker.

AHMAD ALI SHAH,—(PLAINTIFF),—APPELLANT,

Versus

AMIR SHAH AND OTHERS,—(DEPENDANTS),—
RESPONDENTS.

Case No. 1018 of 1895.

APPELLATE SIDE. }

Res judicata—Omission by guardian ad litem of minor to appeal against decree—Gross negligence on part of guardian—Effect of such decree.

Where in a previous suit a decree was passed against the present plaintiff, who at the time was a minor, and was duly represented by his mother as his guardian *ad litem*, held, that the omission by the latter to appeal on his behalf from such decree, notwithstanding that there were excellent grounds, both on law and in the facts, for an appeal, amounted to gross negligence on her part, and that under such circumstances it would be contrary to law and equity to hold the plaintiff bound by the former decree.

The position of a guardian *ad litem* of a minor being that of a trustee, he is bound strictly to act in the interests of the minor, and he has not the liberty, as long as he retains his position, of abandoning the case as he would have were it his own, unless such abandonment is clearly in the interests of the minor. Every case must be judged by its own facts, and for the purpose of finding out whether such guardian was guilty of laches or fraud in previous proceedings, the Court has power to go into them and to form its own conclusions regarding them.

Further appeal from the order of Captain G. S. Martindale, Divisional Judge, Moollan Division, dated 17th June 1895.

Herbert, for appellant.

Fazl Din, for respondents.

The facts of the case sufficiently appear from the judgment of the Court delivered by

CHATTERJI, J. —The facts of this case are sufficiently given 3rd June 1898.
in the judgment of the first Court. The suit has been dismissed on the ground that in the previous case plaintiff represented by his mother as his guardian *ad litem* was sued for possession of this land along with his uncle and a decree was passed against him for possession, and that the claim is *res judicata*, there having been an issue as to the plaintiff being bound by the act of his uncle, Amir Shah, which was decided against him.

In that suit the uncle refused to defend it on plaintiff's behalf on which his mother was appointed his guardian *ad litem*. The minor was thus properly represented and the guardian's defence took the same line as is now taken by the plaintiff. An issue was framed as to her contention, but in a general form which was decided adversely to the minor on the ground that the mortgage by the uncle was binding as it was for the benefit of the joint family. No decision was given on the specific point which was the gist of the contention, *viz.*, that the uncle had no authority "to mortgage his share without obtaining legal permission." The Court ignored the provisions of the Muhammadan law as to the powers of guardians over immovable property belonging to their wards, and held that the uncle as the *de facto* guardian was competent to effect the mortgage for the benefit of the joint family. Long before the date of decision, however, the rule of Muhammadan law obtaining in this Province had been declared by this Court in No. 144, *Punjab Record*, 1883. The mother did not appeal and the decree became final.

The evidence taken in that case did not even prove the ground on which the plaintiff was held bound. It related

almost exclusively to the execution of the mortgage deed, the payment of consideration and the previous possession of the mortgagee under the deed. It would thus seem clear that the plaintiff's guardian had excellent grounds for contesting the decree of the first Court both on the point of law as regards the uncle's authority and on the question of fact as to whether the transaction was for the benefit of the minor.

The question, however, is, can we go into these points in order to see whether the former decree is to have the force of *res judicata* or not? Ordinarily we should not be competent to do so, but if the guardian of the plaintiff was guilty of gross negligence in conducting proceedings on his behalf in the previous litigation the decree would not be binding on him, and we are enabled to go into these questions in order to see whether the guardian has been so guilty or not.

In *Lala Sheo Churn Lal v. Ram Nandan Dobey* (I. L. R., XXII Cal., 8) where the next friend of a minor plaintiff had failed to attend at a hearing, and the case was dismissed in default, it was held that she had acted with gross negligence, though she subsequently unsuccessfully tried to have the order set aside in the same Court and in the Court of Appeal, and that the order of dismissal did not preclude a fresh suit by the ward on his attaining majority. The English practice is the same. See Simpson on *Infants*, 2nd Edition, page 512, and in *re Hoghton* (L. R., XVIII, Eq., 573).

Here the default committed by the guardian was her omission to appeal. She had an excellent case both on law and on the facts and her failure to contest the first Court's decision amounted to gross neglect. We do not mean to say that the duty of defending a suit or of lodging an appeal from an adverse decision is always incumbent on the guardian and that he has no freedom of judgment to decide whether such proceedings should be taken on behalf of the minor or not, or that he is necessarily bound to carry on a litigation when the issue is patently hopeless. The remarks of their Lordships of the Privy Council in *Lekraj Roy v. Mahtab Chand* (XIV M. I. A., page 399) should be borne in mind in this connection. The duty of a guardian for the suit or of a next friend is thus summed up by Mr. Justice Trevelyan in his work on the law relating to minors. He should "do all that in him lies to further the interests of the minor, and he should be at least as active in guarding and promoting the interests of the minor as he would be expected to be if his own interests were

involved," 2nd Edition, page 280. It may be added that his position being that of a trustee he is bound strictly to act in the interests of the minor, and he has not the liberty, as long as he retains his position, of abandoning the case as he would have if it were his own, unless such abandonment is clearly in the interests of the minor. He must act in good faith, that is with due care and caution, and want of knowledge when information was available on inquiry would amount to gross negligence and to constructive fraud. *Bibi Solomon v. Abdul Aziz* (I. L. R., VI Cal., 687). Every case must be judged by its own facts and for the purpose of finding out whether the guardian was guilty of laches or fraud in the previous proceedings, the Court has power to go into them and to form its own conclusions regarding them.

We have shown above that there was not the shadow of a reason for the guardian of the minor for not contesting the Court's decision. She was a woman ignorant and probably incapable of forming a proper judgment, but she was the trustee for the minor and the latter cannot be made to suffer for her laches and negligence to whatever cause they may be due. The probability is that she was induced to forego further proceedings.

On the whole, we are of opinion with reference to the facts of this case that it would be contrary to law and equity to hold the plaintiff bound by the former decree. The case must, therefore, be gone into on the merits and all the other contentions of the parties heard and decided. If the plaintiff is held entitled to succeed, and it is found that he has derived some benefit under the mortgage transaction he should only get a decree subject to his restoring such benefit.

We accept the appeal and reversing the decrees of the lower Courts return the case to the Court of first instance, for a fresh decision with reference to the above remarks. Court-fee on the petition of appeal to be refunded. Other costs to abide the event.

Appeal allowed.

No. 36.

Before Mr. Justice Chatterji and Mr. Justice Gordon Walker.

APPELLATE SIDE. { CHUNDER BHAN AND OTHERS,—(PLAINTIFFS),—
APPELLANTS,

Versus

AHMAD YAR KHAN AND OTHERS,—(DEFENDANTS),—
RESPONDENT.

Case No. 1232 of 1895.

Alluvion and diluvion—Title to land acquired by accretion—Land subsequently re-transferred by avulsion—Identification of site.

Owing to changes in the course of the river Chenab, certain land, which was identified as having originally belonged to plaintiffs, after being submerged, gradually re-appeared on the Muzaffargarh side as the river receded, but was subsequently bodily transferred to the Mooltan side by a sudden change in the course of the river. While the land was on the Muzaffargarh side, the defendants brought a few detached plots under cultivation, and were still cultivating them at the time of suit. The burden of suing for possession of the said land was in consequence upon plaintiffs. The latter instituted a suit and obtained a decree in the first Court, which was, however, reversed on appeal by the Divisional Judge.

Held, in accordance with the principle laid down in *Lopes' case* (5 B. L. R., 521), that inasmuch as the site of the land in question had been duly identified as plaintiffs', the latter were entitled to succeed, and that the mere facts that they did not follow the land when it went to the Muzaffargarh side, and that the defendants had brought a few scattered plots thereof under cultivation, did not affect plaintiffs' rights as owners of the site.

I. L. R., XIX All., 238, not followed.

Further appeal from the order of Captain C. S. Martindale, Divisional Judge, Mooltan Division, dated 17th August 1895.

K. P. Roy, for appellants.

Lal Chand, for respondents.

The facts of the case are fully set forth in the judgment of the Court which was delivered by

9th May 1898.

GORDON WALKER, J.—The plaintiffs in these five appeals (1232—36) are individual proprietors—of *mauza* Dhuddi in the Mooltan District and the defendants are the owners of *mauza* Pakka Sandila in Muzaffargarh District. The cases are of the usual type relating to land subject to the action of the river (Chenab) which is claimed by both parties to the suits.

The history of the case appears to be as follows. Plaintiffs' village (Dhuddi) was originally an area detached from a village of the same name on the Muzaffargarh side of the river.

The Settlement Record shows that the separation took place about 1858. In 1863 there was some dispute about the partition of the area amongst the proprietors, and from those proceedings it appears that 1,349 *bighas* (5,397 *kanals*) had been detached from the original village, this area being apparently formed into a separate estate on the Mooltan side of the river. The real starting point in the case, however, is the settlement survey effected in 1874. In that year boundary (*thakbast*) and field maps were prepared. *Mauza* Dhuddi is shown in them as bounded on the north by *Nun* (?), on the east by *jhok* Lachmi Narain, on the south by Akbarpur, and on the west by the river. During the course of settlement operations the village lands were encroached on by the river, and when the assessment was actually made in 1880, only 135½ *bighas* (543 *kanals*) were left. Erosion or submersion went on till in 1887 (*Sambat* 1943) the whole of the lands of the village had disappeared.

In 1890-91 the river suddenly altered its course towards the Muzaffargarh side, and it was then found (Tahsildar's report dated 25th May 1891, which started the revenue proceedings leading up to these civil suits) that there was a considerable area in dispute between the plaintiffs, owners of *mauza* Dhuddi, and the defendants of Pakka Sandila. The latter alleged that the land had come as an accretion to their village, and that they had taken possession and were still in possession of it, and that as it had been transferred to the Mooltan side by avulsion they were entitled to retain it. The dispute, so far as the Revenue authorities were concerned was decided by the Collector's (Mr. Meredith's) order, dated 30th March 1893, which was passed after a protracted inquiry. That order was supported on appeal to the Commissioner.

The map in the file of those proceedings has been referred to throughout the arguments before us, and may now be referred to. The area in dispute was that indicated by the letters *D K I G*. The Collector found (and this has nowhere been questioned) that the area had been recovered from the river in three lots :—

<i>D B E F G</i>	in <i>Sambat</i> 1933	(1877-78);
<i>F K J H F</i>	in <i>Sambat</i> 1942-43	(1886-87);
<i>J H I</i>	in <i>Sambat</i> 1945-46	(1889-90).

Making a slight adjustment of the boundary between the first two of these plots, the Collector awarded to the village of Pakka Sandila the plot marked in the map *D B O G*, thus restoring the settlement boundary of *mauza* Dhuddi to the line *A B C*.

All to the east of that line he allotted to *mausa* Dhuddi, and that is the area which is now in dispute. The effect of the Collector's order was to restore the boundaries of *mausa* Dhuddi according to the settlement survey of 1874 already referred to.

The area in dispute certainly went to the Muzaffargarh side of the river by accretion and has come back by avulsion, these terms being used in their ordinarily accepted sense. In other words the land, after being submerged, gradually reappeared on the Muzaffargarh side as the river receded, and was then bodily transferred to the Mooltan side by a sudden change in the course of the river. At the same time it may be noted that the "accretion" took place apparently in *two* seasons, the land being recovered in two large plots. While the land was on the Muzaffargarh side the defendants brought a few detached plots under cultivation, and these they still cultivate. Although by the Collector's decision the land in dispute was included in the village boundaries of Dhuddi, the defendants, owners of Pakka Sandila, remained in at least partial possession, so that plaintiffs had to sue. They obtained a decree in the first Court, but on appeal to the Divisional Judge their suit was dismissed.

As regards the question of limitation, which may be dealt with first, defendants cannot allege possession (except in respect of the small triangular piece of land marked *B E L*) prior to *Sambat* 1942-43. Before that, as the land was submerged, it was incapable of being physically possessed, so that the fact of plaintiffs being out of possession cannot tell against them. The plaintiffs certainly did not "of their own act cease to possess" (*Punjab Record*, No. 6 of 1896).

Next as to the rule of decision to be applied to the case. The *Riwaj-i-am* gives the custom applicable to these two villages as that of "*len den*." The question of custom is not however really material. Defendants base their claim to retain the land on the facts that when it appeared on the Muzaffargarh side they took possession of it as proprietors, and that it has been transferred to the Mooltan side of the river in a clearly recognizable form by "avulsion," their possession remaining undisturbed. The Divisional Judge has admitted their claim on these grounds and has referred in support of his view to an unpublished decision of this Court (No. 321 of 1893) to which reference has also been made before us. That was a case between villages of Pakka Sandila (defendants in this case) and Akbarpur which adjoins Dhuddi on the south. The full facts

with regard to the land there in dispute do not appear from the judgment, but it may be noted that it had "according to the general rule admitted by both parties become the *owner-ship* of defendants by gradual river action." That in itself would be enough to distinguish the two cases. It may be also noted that the recorded custom between the two villages of Akbarpur and Pakka Sandila is different from that recorded as in force between the parties' villages. The former two villages made an exception from the generally accepted custom of *len den*, and intimated their intention to adhere as between themselves to that of the *deep stream*.

The rule to be applied to the circumstances of the present dispute appears to us very clearly to be that laid down by the Privy Council in the well known *Lopez case* (5 B. L. R., page 521). That is the rule which has been followed by this Court in such cases. There can be no question whatever as to the identification of the *site* of the land in dispute as plaintiffs' according to the settlement maps, and the Collector's decision has merely restored the boundaries of their village to what they were when the settlement survey was made. The boundaries of plaintiffs' village on the three sides away from the river are clearly defined by those of adjoining villages, and what the defendants' claim is to come in between Dhuddi and Akbarpur, pushing their boundary right up to that of *jhuk* Lachmi Narain and completely separating the two former villages. The case is a very apt illustration of the injustice that would result from the acceptance of any principle other than that laid down in *Lopez case*. It is quite immaterial that plaintiffs did not follow the land when it went to the Muzaffargarh side, and that defendants did in fact bring a few scattered plots under cultivation. That cannot in any way affect the rights of plaintiffs as owners of the site. We have been referred to a recent ruling of the Allahabad High Court (XIX, page 238), and that would certainly seem to be in favour of defendants' contention. But we are not prepared to accept the distinction which seems to be there drawn between *Lopez case* and one like the present.

It is only necessary to notice two minor points. The plaintiffs in each of these five cases have proved that the land was their property. They have in fact sued according to the old map. Then as to the small triangular plot *B E L*. It does not appear that plaintiffs have lost their rights in this any

more than in the rest of the land in dispute, or that defendants have been in effective possession of it.

The appeal in this case is accepted and the order of the first Court restored, plaintiffs being given a decree for the land in suit with costs throughout.

Appeal allowed.

No. 37.

Before Mr. Justice Chatterji and Mr. Justice Gordon Walker.

APPELLATE SIDE. {

MUSSAMMAT EMNA AND ANOTHER,—(DEFENDANTS),
APPELLANTS,

Versus

SAJAWAL KHAN AND OTHERS,—(PLAINTIFFS),—
RESPONDENTS.

Case No. 76 of 1896.

*Custom—Succession—Respective rights of daughters and collaterals—
Sabzani Lund Bilochis, Dera Ghazi Khan District—Riwaj-i-am.*

Found, that defendants had failed to prove that, by custom among Sabzani Lund Bilochis of Dera Ghazi Khan District, daughters are entitled to succeed in preference to collaterals.

In such cases the mere fact that the daughter has married in the tribe and is in actual possession of the land gives her no right of succession superior to that of the collaterals.

Further appeal from the order of R. L. Harris, Esquire, Divisional Judge, Derajat Division, dated 31st October 1895.

Muhammad Shah Din, for appellants.

Shelverton, for respondents.

The judgment of the Court was delivered by

13th May 1898.

GORDON WALKER, J.—The parties to the suit are Sabzani Lund Bilochis of the Dera Ghazi Khan District. A pedigree table is given in the judgment of the District Judge. The dispute is about the succession to the landed property of *Sanjar*, defendant, his daughter, being in possession, and plaintiffs, who are collaterals, suing to recover on the ground that they exclude the daughters. The plaintiffs are related to the deceased through his great-great-grandfather.

The plaintiffs have succeeded in the two lower Courts which have followed the decision of this Court in the case No. 1157 of 1892. In that case also the parties were Lund Bilochis, and there was in the first instance a doubt as to the meaning of Section 43 of the *Riwaj-i-am* which is to the effect that "The collaterals in the third degree are entitled to succeed."

“More distant collaterals have no right. In that case (*lit.* at “that time) daughters or their descendants will succeed. But “*there are no instances forthcoming.*” The question was as to the meaning of the term *third degree* and there was further inquiry on this point. But when the case came up for final decision it was held that “as the entry (in the *Riwaj-i-am*) is of no “weight it is not very material how the Bilochis calculate “degrees of relationship.” “The evidence is now to the effect “that daughters are excluded by *the most distant collaterals.*” Further it was held that “the collaterals should not be “deprived of the estate except on evidence of a much more “convincing nature than has been produced in this case.”

In that case reference was made only to Section 43 of the *Riwaj-i-am*. But Sections 37 and 38 are also very material. They are to the following effect :—

“37. If there are no male lineal descendants even then “the daughter or her children do not succeed. The collaterals “of the father are the heirs.”

“38. In our tribe (Biloch Lund) neither daughters nor “sisters succeed except that they may be given something by “written deed.”

It may, no doubt, be said of these entries, as of Section 43, that they are not of much weight, the custom alleged being “professedly by an arbitrator one, if not based on precedent.” There is one instance given under Section 37, but that relates to this very case and is founded on the assumption that the award of the Revenue authorities (in mutation proceedings) was final, to the effect that Sanjar's widow should succeed him in the first instance, and, after that, the collaterals, to the exclusion of the daughters.

It is not material in this case that the defendants (daughters) have married in the tribe, and the fact that they are in possession of the land can give them no claim.

We find that the defendants (daughters) have failed to prove that they are by custom entitled to exclude the plaintiffs (collaterals), and we dismiss the appeal with costs.

Appeal dismissed.

No. 38.

Before Mr. Justice Stogdon.

APPELLATE SIDE. }

SAGHAR MAL,—(JUDGMENT-DEBTOR),—APPELLANT,

Versus

HYAT,—(DECREE-HOLDER),—RESPONDENT.

Case No: 1482 of 1897.

Civil Procedure Code, 1882, Section 244—Decree for pre-emption—Question whether decree-holder has paid money into Court within time.

On the 19th May 1897, Hyat obtained a decree against Saghar Mal, vendee, for pre-emption of certain land, and it was ordered that on payment by him of Rs. 2,000 purchase-money, by the 28th June 1897, for payment to Saghar Mal, vendee, together with Rs. 29 cost of sale-deed and registration, he should be put in possession of the land, and that, in default of deposit of the said sums, the decree should become void. The decree-holder, by mistake, paid into Court only Rs. 2,000 by the 28th June, and on the 1st July the vendee submitted an application urging that the decree had become void in consequence of the failure of the decree-holder to pay in the whole amount specified in the decree. This application having been rejected, the judgment-debtor (vendee) appealed to the Divisional Judge, but his appeal was dismissed on the ground that no appeal lay.

Held, that the question whether the purchase-money had been deposited in time was one arising between the parties to the suit, in which the decree was passed, and relating to the execution thereof, within the meaning of Section 244 of the Civil Procedure Code.

Held, therefore, that an appeal lay to the Divisional Judge from the order rejecting the application.

Miscellaneous appeal from the order of T. J. Kennedy, Esquire, Divisional Judge, Mooltan Division, dated 4th November 1897.

Jaishi Ram, for appellant.

Oertal, for respondent.

The following judgment was delivered by

18th March 1898.

STODDON, J.—On the 19th May 1897 Hayat obtained a decree against Saghar Mal, vendee, for pre-emption of $\frac{3}{4}$ th of the Baghwala well, and it was ordered that on payment by him of Rs. 2,000, purchase-money, by the 28th June 1897 for payment to Saghar Mal, vendee, along with Rs. 29 cost of sale-deed and registration, he should be put in possession of the land, and that, in default of deposit of the said purchase-money, the decree should become void.

The decree-holder by mistake paid into Court only Rs. 2,000 by the 28th June. On the 1st July the vendee submitted an application urging that the decree had become void, in consequence of the failure of the decree-holder to pay in the whole amount specified in the decree.

The Munsif rejected his application on the 22nd July. His appeal to the Divisional Judge was rejected on the ground that no appeal lay.

The Divisional Judge held on the authority of *Muhammad Ali and others v. Debi Din Bai* (I. L. R., IV All., 420) that the question whether the plaintiff had paid the purchase-money into Court within time was not one relating to the execution of the decree, within the meaning of Section 244, Civil Procedure Code, but was one which should be decided in the suit itself. He admitted that this decision was opposed to *Mahtab Singh v. Bela Singh*, *Punjab Record*, No. 32 of 1879, but as the judgment in Mahtab Singh's case was based on a construction of Section 11, Act XXIII, 1861, while that in Muhammad Ali's case was based on Section 244, Act X, 1877, which is practically identical with Section 244, Act XIV, 1882, he followed the latter. Section 11, Act XXIII, 1861, prescribes, among other things, that any other questions arising between the parties to the suit, in which the decree was passed, and relating to the execution of the decree, shall be determined by order of the Court executing the decree, and not by separate suit. Section 244 (c), Act XIV, 1882, is to the same effect with some unimportant amplifications. Such being the case, the Divisional Judge should either have followed the ruling of this Court, or have given some adequate reasons for not doing so. With all due deference to the opinion of the learned Judges who decided Muhammad Ali's case, it appears to me that the question whether the purchase-money had been deposited in time was one arising between the parties to the suit, in which the decree was passed, and relating to the execution thereof. The Divisional Judge has held that it was not between the parties to the suit, because it was only between the decree-holder and the vendee, and not between the decree-holder and the vendee and vendors, but the word "parties" includes some of the parties and does not necessarily mean the whole of the parties. The question between the parties certainly related to the execution of the decree. The decree-holder wished to execute his decree, and the vendee urged in bar of his application that he had lost his right to do so, because he had not deposited the whole of the purchase-money by the date fixed.

I set aside the order of the Divisional Judge, and remand the case to him under Section 562, Civil Procedure Code, for disposal on the merits. Costs to be costs in the case.

Appeal allowed.

No. 39.

Before Mr. Justice Chatterji and Mr. Justice Anderson.

APPELLATE SIDE. }

ISHAR SINGH,—(PLAINTIFF),—APPELLANT,

Versus

LAL SINGH AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

Case No. 177 of 1896.

*Occupancy Rights—Alienation by widow in favour of proprietor—Right of reversioner to object—Punjab Tenancy Act, 1887, Section 59 (3).**Held*, that a mortgage of occupancy rights by a widow is void under Section 59 (3) of the Punjab Tenancy Act, 1887, and none the less so because such mortgage is in favour of some of the proprietary body.*Held*, also, that plaintiff, as the reversionary heir to the widow and a co-sharer with her in the holding which was undivided, was entitled to sue for a declaration that such mortgage was void.*Further appeal from the order of Colonel C. H. T. Marshall, Divisional Judge, Lahore Division, dated 22nd November 1895.*

Ganpat Rai, for appellant.

The facts of the case sufficiently appear from the following judgment of the Court delivered by

4th June 1898.

CHATTERJI, J.—The material facts of this case are shortly these: Mussammat Sewan, widow of Lal Singh, an occupancy tenant of Rajajang, on 19th November 1894, executed a mortgage deed of her share of land for Rs. 900 in favour of Gujar Singh and others, some of the proprietors of the holding which is recorded as *shamilat* of *patti* Rupa. Ishar Singh, plaintiff, the brother of Lal Singh, sued for a declaration that the mortgage would not affect his reversionary rights. He is a co-sharer with the widow in the tenancy, and his ground of action is that the alienation was effected without necessity.

The defendants pleaded necessity, and that the widow was competent to mortgage without necessity as occupancy rights and not proprietary interests had been alienated.

The first Court found necessity not proved and gave a decree in plaintiff's favour, but the Divisional Judge held that necessity had been proved to the extent of Rs. 453, and that the mortgage was good for that sum. The plaintiff appeals and the defendants have filed cross-objections under Section 561, Civil Procedure Code.

We are disposed to concur with the first Court that there is no proof of any valid necessity, and the Divisional Judge's

reasoning is insufficient to establish anything more than that the widow had some dealings with the defendants, and had borrowed some money from them. But the true ground upon which the case ought to be decided appears to be that the widow's alienation, whether for necessity or not, is void under Section 59, sub-section (3) of the Punjab Tenancy Act, which declares her incompetent to effect any transfer of the occupancy rights to which she has succeeded except a sub-lease for a term not exceeding one year.

It was argued that transfers to landlords cannot be challenged by the reversioners of a tenant, and No. 31, *Punjab Record*, 1896, was referred to in support of the contention as well as No. 68, *Punjab Record*, 1894. We are of opinion, however, that neither authority is in point. The transfers in those cases were by males. The Tenancy Act contains provisions for the acquisition of the tenant's right by the proprietor, and it was held that where a transfer was made either to the landlord or with his sanction to some one else, the reversioners had no *locus standi* to object. The present is a case of alienation by a widow, and though it is in favour of some of the proprietary body, this circumstance does not affect the operation of sub-section (3) of Section 59, which distinctly forbids all alienations of whatever sort by her except the sub-lease for the limited term mentioned therein. There is no exception made in favour of alienations to proprietors, nor can any such inference be drawn from a comparison of the several sections bearing on the subject of alienations by the tenant. It would seem that the legislature in order to avoid the harassing and expensive litigation which constantly arises in respect of transfers by widows meant to give only a strict life interest in occupancy rights inherited by them from their husbands. There is no provision in the Settlement Record bearing on the question before us which can control the operation of the sub-section, *vide* Section 112 of the Act.

The plaintiff is a co-sharer with Mussammat Sewan and the holding is undivided. If there is no valid transfer of the portion held by the widow, he would undoubtedly succeed to it on her death by right of survivorship. Had there been no widow he would have succeeded on his brother's death. Under the circumstances, he has clearly a right to sue to have the mortgage declared void. A similar view in respect of the rights of reversioners to object to widow's alienations was held in No. 205, *Punjab Record*, 1889, though the ground

on which we are deciding the present case was not noticed in the judgment. As pointed out above, plaintiff is not an ordinary reversioner, but a joint sharer whose right stands on a much higher footing, and though he has sued on the allegation of want of necessity, and of the widow's incompetency under custom to alienate without necessity, he is entitled to succeed irrespective of these grounds on the statutory provision limiting her power of disposition over the property held by her.

We accept the appeal and restore the decree of the first Court with all subsequent costs. The defendants' cross-objections are dismissed with costs.

Appeal allowed.

No. 40.

Before Mr. Justice Reid and Mr. Justice Gordon Walker.

BUDHE KHAN,—(JUDGMENT-DEBTOR),—APPELLANT,

Versus

BIR BAL,—(DECREE-HOLDER),—RESPONDENT.

Case No. 99 of 1896.

APPELLATE SIDE. }

Execution of decree—Limitation—Civil Procedure Code, 1882, Sections 230, 235—Limitation Act, 1877, 2nd Schedule, Article 179 (iv).

The decree, of which execution was sought, was passed on the 15th July 1880, and an application for execution by attachment and sale of moveable property was made on the 27th October 1882, but as no moveable property could be found, the proceedings were infructuous and terminated. Subsequently, on the 18th October 1883, on a fresh application for execution, the judgment-debtor was arrested and imprisoned, and a small sum of money was realised by sale of a document. On the 29th January 1884 an application was made for execution by attachment and sale of immoveable property of the judgment-debtor. The executing Court dealt with this application as one for a farm of the property, but the error was amended by the Divisional Court on appeal, and proceedings were protracted until, on the 31st October 1891, the Commissioner of the Division refused to sanction sale of the property. On the 31st October 1892 the decree-holder filed an application, setting forth the refusal of the Commissioner to sanction the said sale and his own fruitless endeavours to realise his decree, and praying that the land be sold or a receiver appointed under Section 503 of the Civil Procedure Code. An order for the appointment of a receiver having been made, the judgment-debtor appealed to the Chief Court, and it was contended on his behalf that execution of the decree was barred under the provisions of Section 230 of the Code, and Article 179 (iv) of the 2nd Schedule to the Limitation Act, 1877. It was urged that the application of 1892 was "a subsequent application" within the meaning of the said section of the Code.

Held, that the said application was nearly a petition to the Court seized of, and already executing, the decree on the application of 1884, to take a step in aid of the execution on that application, and was, therefore, not barred under Section 230 of the Code, which does not apply to applications or petition asking the Court to give effect to previous petitions still pending.

Held, further, that inasmuch as proceedings in execution had been pending ever since 1884, execution was not barred by reason of "steps in aid of execution" not having been taken every three years.

Miscellaneous appeal from the order of C. P. Bird, Esquire, Divisional Judge, Hoshiarpur Division, dated 28th November 1895.

Muhammad Shafi, for appellant.

Ishwar Das, for respondent.

The judgment of the Court was delivered by

REID, J.—The decree of which execution is sought was *6th June 1898.* passed on the 15th July 1880. An application for execution by attachment and sale of moveable property was made on the 27th October 1882; as no moveable property could be found, the proceedings were infructuous and terminated.

On the 18th October 1883 a fresh application for execution was made, the judgment-debtor was arrested and imprisoned, and about Rs. 28 were realised by the sale of a document. On the 29th January 1884 an application was made for execution by attachment and sale of immoveable property of the judgment-debtor. The executing Court dealt with the application as one for a farm of the property, the Divisional Court on appeal amended this error, and proceedings were protracted until, on the 31st October 1891, the Commissioner of the Division refused to sanction sale of the property.

On the 31st October 1892 the decree-holder filed the following application:—"The Commissioner has refused to "sanction the sale of land, regardless of Chief Court rules
" * * * * Although the decree-holder accepted a temporary transfer of the land, the Collector would not sanction it. "I have done my best to realise the decree, but to no effect. "I pray that either the land be sold or that a receiver, under "Section 503 of the Code of Civil Procedure, be appointed to "realise the decree money from the profits of the land, the "only alternative left for me being to make this application.
" * * * * * It is requested that either part of the "land be sold or a receiver be appointed * * * *
"so as to realise the decree from the profits of the land."

On this application an order was passed for the appointment of a receiver, and from that order this appeal has been filed.

The only point taken for the appellant is that execution is barred by limitation, having regard to the provisions of Section 230 of the Code of Civil Procedure and Article 179 (iv) of the 2nd Schedule of the Limitation Act.

It is urged that the application of 1884 is defective, in that it does not comply with all the provisions (a) to (i) of Section 235 of the Code. It is admitted that the property of which attachment and sale were sought was sufficiently described. This distinguishes the application from that dealt with in *Asgar Ali v. Troilokya Nath Ghose*, XVII Calc. (F. B.), 631, and we hold that it was made "in accordance with law," and could form a fresh starting point under Article 179.

It is further urged that the application of 1892 is a subsequent application, within the meaning of Section 230 of the Code, and that execution is barred by that section. The decisions in *Ram Sahai v. Nanni*, VI All. Weekly Notes, 137, and in *Rahim Ali Khan v. Phul Chand*, I. L. R., XVIII All. (F. B.), 482, are in point, and we have no hesitation in holding that the application of 1892 was merely "a petition to the Court seised of, and already executing, the decree on the application of 1884 to take a step in aid of the execution on that application." It is not contended that the property of the judgment-debtor did not remain throughout under attachment, consequent on the application of 1884 and execution is not barred by Section 230 of the Code, which does not apply to an application or petition asking the Code to give effect to a previous petition, still pending. It is obvious that the application in question is not, and does not profess to be, an application under Section 235 of the Code, No. 106, *Punjab Record*, 1894, and *Radha Kissore Boss v. Aftab Chundra Mahtab*, I. L. R., VII Calc., 61, are in point. The rulings quoted, and *Virarama v. Annasami*, I. L. R., VI Mad., 359, and *Panaul Haq v. Kishen Mun Dabee*, IX C. L. R., 297, are fatal to the contention that the order appealed against is bad by reason of its having been passed more than 12 years after the decree, while, in our view that proceedings in execution have been pending ever since 1884, the argument that execution is barred by reason of "steps in aid" not having been taken every three years, fails.

The appeal fails, and is dismissed with costs.

No. 41.

Before Mr. Justice Chatterji and Mr. Justice Gordon Walker.

MUSSAMMAT NIKKI,—(PLAINTIFF),—PETITIONER,

Versus

BISHEN DAS,—(DEFENDANT),—RESPONDENT.

} REVISION SIDE.

Case No. 950 of 1898.

Punjab Courts Act, 1884, Section 40 (i) (ii)—“Point of law involved”
—Question as to burden of proof—Separation deed between husband and
wife—Allegations of misconduct on part of wife—Revision—Civil Procedure
Code, Section 622.

The Divisional Judge granted a certificate of appeal, under Section 40 of the Punjab Courts Act, to the effect that “a question of law is involved, namely, whether a child born in the lifetime of its father is not presumed to be a legitimate one, and whether the *onus probandi* was not on the defendant-appellant to prove the unchastity of his wife, and whether it is not a question of ‘no proof’ about the finding of unchastity of the plaintiff-respondent, and that the case is, in my opinion, of sufficient importance to justify a further appeal.”

Held, that the certificate on the question of *onus probandi* and the mode of decision was not one contemplated in the Act, and was bad.

Seemle: The right construction of the word “involved” is that it applies to the case rather than to the appeal which is to be certified under sub-section (i) (d), or admitted under sub-section (ii) of Section 40 of the Act, and includes points which may be raised by way of defence in an appeal.

But *held* that the Divisional Judge had acted with material irregularity, within the meaning of Section 622 of the Civil Procedure Code, inasmuch as (1) he had started a new ground of defence not pleaded by the defendant, *viz.*, that the agreement for separation between the defendant and his wife (the plaintiff) was obtained under pressure, and should not be enforced; (2) he had absolved the defendant from liability, although finding that defendant had committed a breach of the agreement from the beginning; (3) he had wrongly decided the question of *onus* of proof as regards breach of the terms of the agreement, and (4) he had dealt in generalities and conjectures about plaintiff's general bad conduct instead of giving definite findings on the evidence as regards specific misbehaviour on her part.

Although Hindu Law does not recognize divorce, the marriage tie being indissoluble, yet where the finding of a Court, in a suit by the wife for maintenance, would put an end to the plaintiff's conjugal rights, make her an outcast, and probably drive her into the streets for her livelihood, the evidence as to adultery and immorality on her part should be of a definite character as well as cogent and reliable, before the Court acts upon it for the purpose of dismissing her suit.

Section 622 of the Civil Procedure Code lays down the conditions under which the Court may revise the proceedings of subordinate Courts,

and its powers of interference is subject to these conditions. But once the jurisdiction to revise is established on any of the grounds specified in the first part of the said section, there is no limitation imposed on the power of the Court as to the mode of disposal. The section is intended to arm the Court with the power of remedying injustice in cases not subject to appeal under certain specified circumstances, and, therefore, when the grounds of jurisdiction are established and a fit case shown for the exercise of its powers, there is nothing in the section to preclude the Court from finally disposing of the case itself because points of fact, and not points of law, are involved.

The Court finding that defendant had entirely failed to prove breach of the conditions of the agreement between him and plaintiff on the part of plaintiff, or that the latter had been guilty of any immorality, set aside the order of the Divisional Court, and restored the decree which plaintiff had obtained in the first Court.

Petition for revision of the order of J. A. Anderson, Esquire, Divisional Judge, Amritsar Division, dated 21st October 1896.

Ganpat Rai, for petitioner.

Lal Chand, for respondent.

The facts of the case are fully set forth in the judgment of the Court which was delivered by

7th June 1898. CHATTERJI, J.—The plaintiff is the second wife of the defendant. In 1894 she brought a complaint, under Section 488, Criminal Procedure Code, against her husband in the Court of Sardar Sher Ahmad Khan, Magistrate, Amritsar, for maintenance, but withdrew it on 13th March 1894 on his agreeing to pay her Rs. 8 a month maintenance on certain conditions as to her residence and conduct, which she undertook to observe. She now sues for Rs. 152 arrears for 19 months at the stipulated rate, alleging that her husband never kept his promise beyond letting her live with him for one month after the case. The defendant pleads that plaintiff has broken the conditions subject to which her maintenance was promised, that she has not lived in any house provided by him, and that her conduct has been immoral. Another plea was that the agreement was void as causing separation between husband and wife. There was also a claim for house rent in the plaint, and this was likewise denied by the defendant.

The first Court drew four issues, and found them all in plaintiff's favour, and decreed the claim except as regards house rent. The Divisional Judge on appeal found that the plaintiff's conduct since the agreement had been immoral, and that she had given birth to an illegitimate child. He also considered that the agreement had been brought about by

pressure, and naturally had not been acted on by defendant. He therefore dismissed the suit.

A further appeal has been admitted on a certificate given by the Divisional Judge to this effect "that a question of law is involved, namely, whether a child born in the lifetime of the father is not presumed to be a legitimate one, and whether the *onus probandi* was not on the defendant-appellant to prove the unchastity of his wife, and whether it is not a question of 'no proof' about the finding of unchastity of the plaintiff-respondent, and that the case is, in my opinion, of sufficient importance to justify a further appeal."

It is objected for the respondent that there is no point of law involved, and that the certificate is not a valid one, as it raises no question on which a further appeal can be admitted. After hearing argument on the preliminary objection we have heard argument on the whole case, reserving our decision on the objection.

It is ruled in No. 45, *Punjab Record*, 1894, that the proper allocation of the burden of proof may be in some sense "a question of law"; but it is rather a question incidental to the proceedings in the case between the contesting parties than involved in it, within the meaning of Section 42 (2) of the Punjab Courts Act, and that a mere question of irregularity in the proceedings of the Court of first appeal contained in the judgment, though it may be a question of law, is an incidental question of law, and not a question of law involved in the case within the meaning of the section and sub-section. The matter was discussed in more detail in No. 68, *Punjab Record*, 1897, and a similar conclusion arrived at on the principle of *nascitur a sociis* from the juxtaposition of the words "question of custom" or "general interest" with the words "question of law" in Section 40, sub-section (1) (d) and sub-section (2), the two former expressions clearly not referring to anything relating to the procedure of the inquiry into the case. It would seem therefore that the certificate on the question of *onus* and the mode of decision is not contemplated in the Act and is bad.

It was argued for the appellant that there are other questions of law involved, though not set out in the certificate. One is the question whether the agreement is void as tending to cause separation between husband and wife which forms

the subject of the third issue. But this issue was decided in plaintiff's favour in the first Court, and the finding has not been touched by the Court of Appeal. The appeal therefore does not raise it, and it is so transparently absurd that had we to admit a further appeal under Section 40 (2), we could not do so on the ground that it might be raised by way of defence by the respondent, if the appellant's grounds disclosed no point of law or justified such admission. The right construction of the word "involved" probably is that it applies to the case rather than to the appeal which is to be certified under sub-section (1) (d), or admitted under Section (2), and includes points which may be raised by way of defence in an appeal. For instance, a Divisional Court might erroneously decide an important point of law or custom against a party in his Court, and find in his favour on facts. If no further appeal is held to lie in such a case the question of law or custom can never be considered by this Court; while, if the wider interpretation is accepted, the respondent, on the appeal being admitted, may defend the appeal on such point which can then be adjudicated on here. Having regard to the different wording of Section 184 (a), Civil Procedure Code, by which a second appeal lies only on the ground of the decision of the Court of Appeal being contrary to some specified law or usage, we are inclined to hold that the language employed in sub-section (1) (d) and sub-section (2) of Section 40 indicates a conscious departure from the rule laid down in the former, and admits of the construction we are inclined to put on it. The point is, however, not before us, and we only decide that the question of law mentioned by appellant is not one on which we should feel inclined to admit a further appeal.

It is next urged by appellant that the Divisional Judge has decided on a point of law, *viz.*, that the agreement was an "enforced" one, and probably obtained under pressure, and that effect should not be given to it. It is true that the Divisional Judge has laid considerable stress on such a point, but it did not arise on the pleadings, and was therefore hardly "involved" in the case. It is not also clear that the case is solely decided on this point, inasmuch as the Divisional Judge has given a finding on the evidence, and it is just possible that his meaning is not that the agreement is void on the ground of undue influence. We do not think, therefore, that there is a ground of law made out on which a further appeal can be entertained.

We are also asked by the appellant to interfere on the revision side as the case is before us, and sufficient grounds exist for our taking action under Section 622, Civil Procedure Code. After a careful consideration of the arguments on both sides we are of opinion that this contention must prevail. The judgment of the Divisional Judge does not properly dispose of the case, and teems with irregularities.

In the first place he has started a new ground of defence not pleaded by defendant, *viz.*, that the agreement was obtained under pressure, and should not be enforced. If this means as it ostensibly does that the agreement was not voluntarily entered into by the defendant, and is not binding on him, we consider he had no right to take it up, as not only is it not raised in the pleadings or in the grounds of appeal but is not supported by a tittle of proof. If it means that the defendant entered into the agreement with reluctance it is a matter utterly irrelevant, and should not have entered into the consideration of the case at all.

In the next place, the broad question raised by the pleading and the issues is whether the plaintiff has committed breach of any of the conditions of the agreement so as to disentitle her to claim maintenance. The first Court finds that that she has not. The Divisional Judge holds that the agreement "has never been acted on for a single month," and that it "resulted in nothing, and defendant gave the woman no money," to use his own language. In other words he finds that defendant has committed breach of the agreement from the beginning, and he almost hints that defendant never intended to abide by it. This, we may observe, demolishes defendant's contention that he hired a house for plaintiff, but that she would not live in it. As regards plaintiff's breaches there is no distinct finding, but the learned Judge speaks at length about a child having been born to plaintiff which he holds to be illegitimate, though there is no reference to it in the proceedings beyond a few questions put to the plaintiff in cross-examination when she gave her evidence. It does not appear whether the Judge was aware that immorality since the agreement alone was relevant, and disentitled plaintiff to maintenance, the agreement being clearly a condonation of past misconduct, if there was any. He was also bound to find that the child was illicitly conceived since the date of the agreement.

Thirdly, the learned Judge is clearly wrong on the question of *onus* of proof as regards breach. Plaintiff as the wife

of defendant and under the specific terms of the agreement is entitled to maintenance. Defendant is liable unless breaches of the conditions of the agreement by plaintiff are proved. Surely it is for him to prove them. Plaintiff cannot prove a negative. Further, as regards the child, the Divisional Judge in finding against the plaintiff on the ground of its birth has failed to notice the conclusive presumption in favour of its legitimacy under Section 112, Evidence Act. His error appears to have been pointed out to him when the application for certificate was made.

Lastly, the Divisional Judge's judgment deals in generalities and conjectures about plaintiff's general bad conduct, instead of giving definite findings on the evidence as regards specific misbehaviour.

In our opinion, there are sufficient grounds for holding that his judgment is unsatisfactory, and that in deciding the appeal he has committed material irregularities in respect of the matters mentioned above.

Interference under Section 622, Civil Procedure Code, is a matter of discretion, and it is necessary to see whether the present is a fit case for the exercise of the powers given to this Court by that section. An examination of the record shows that there are ample grounds for our interference. In a suit like this where a decision adverse to the plaintiff would practically put an end to her marital rights, the allegation of misconduct ought to have been specific. Parties should have been examined as to them, and evidence should have been directed to establish or disprove them. The defendant, however, has made no such allegations, but has contented himself with a general plea that plaintiff has not fulfilled the conditions of the agreement. The manner of production of evidence for the defence is remarkable. On 22nd February 1896 defendant produced six witnesses who say nothing which can be treated as legal evidence of any breach of the agreement on the part of the plaintiff. They certainly prove no immoral conduct on her part. After their statements had been recorded defendant stated that his evidence was finished, but that he wished to produce some witnesses from Lahore, one of whom, Radha Kishen, was present and might be examined.

Radha Kishen was called, but was not found. Defendant finally obtained leave on 24th February on payment of costs to produce fresh evidence. He then called two witnesses, Bhola Singh of Amritsar and Bisheswar of Lahore. The former

deposed to having seen plaintiff openly going about in the streets of Amritsar with loose women for immoral purposes, but admitted that this was some three or four years before the time of his giving evidence. The latter spoke of her going about shamelessly in the bazars of Lahore in the company of strangers. The relevancy of the former's statement appears to be very questionable, and there can be no hesitation in pronouncing the evidence of both to be transparently false. The witnesses both say that the facts they depose to were never mentioned by them to the defendant, which the latter's counsel admits is untrue. Besides this the manner of their production, their connection with defendant and the substance of their evidence leaves no doubt in our minds that they are suborned witnesses. Plaintiff's character cannot in the least be injured by such perjured testimony.

Hindu Law does not recognize divorce, the marriage tie being regarded as indissoluble. The finding of the Divisional Judge, however, puts an end to plaintiff's conjugal rights, makes her an outcaste and drives her into the streets for her livelihood, unless her parents choose, and are able, to maintain her. Had this evidence been produced in a suit for dissolution of marriage under Act IV of 1869, or in an English Divorce Court, it would have been insufficient to establish adultery by the wife. There is no reason why a different rule should be adopted to blast the reputation of a Hindu wife and to deprive her of the rights she has under her status. The evidence as to adultery and immorality ought to be of a definite character as well as cogent and reliable.

As regards the child born by plaintiff, defendant was bound to make its birth a specific point against her if he insisted on its illegitimacy. He did not categorically deny its paternity. Plaintiff's statement regarding it is clear and apparently straightforward, which is but feebly met by defendant's general denial. The defendant is well off, and probably married the plaintiff in the hope of having male issue. This hope has not been fulfilled, and there is good ground for suspecting that acting under the influence of his first wife defendant is treating plaintiff with unkindness.

For these reasons we hold that the case is one in which in the interests of justice we ought to interfere as a Court of revision.

It is argued by the respondent's counsel that we have no power to decide the case on facts, and that if it appears that

the Divisional Judge's judgment must be set aside on the ground of material irregularity we are bound to return the case to him for a fresh decision. After giving the contention our best consideration we are unable to accede to it. Section 622, Civil Procedure Code, lays down the conditions under which this Court may revise the proceedings of Subordinate Courts, and our power of interference is subject to those conditions. But once the jurisdiction to revise is established on any of the grounds specified in the first part of the section there is no limitation imposed on the power of the Court as to the mode of disposal. On the contrary, the last part of the section says that the Court may pass any order it thinks fit. These words must be construed in their plain grammatical sense, as it is not shown that they are used in a special sense. They do not impose any restriction against our deciding the case ourselves, or limit us to doing so on points of law alone, and not on points of fact.

On the contrary, if the aid of any rule of construction is necessary to support the plain meaning of the words we think there are ample grounds for taking a liberal view of our powers. The section is intended to arm this Court with the power of remedying injustice in cases not subject to appeal under certain specified circumstances. If we were compelled in every instance where facts are involved to return the case to the lower Court for re-decision this object would to a great extent be defeated. The legislature cannot be presumed to favour prolongation of litigation or multiplicity of proceedings. When therefore the grounds of jurisdiction are established and a fit case shown for the exercise of our powers, we see no reason, in the face of the plain words of the section, to adopt a construction by which we should be precluded from finally disposing of the case, because points of fact and not simply points of law are involved. The record does not here necessitate, as it generally does in cases of this kind, a remand to the lower Court for a fresh decision. See observations of Stuart, C. J., in *Maulvi Muhammad v. Sayad Hussain*, 1. L. R., III All., 203, and *Sarnam Tewari v. Sakina Bibi*, ibid 417. Another reason for taking this view is that it seems to be beyond question that the Court has the power to go into facts in order to ascertain whether the grounds of jurisdiction or the conditions of cognizance exist or not. *The Liverpool Gas Company v. Everton*, L. R., 6, C. P., 414, *Shiva Nathaji v. Joma Kashinath*, 1. L. R., VII Bom., 341, at page 371. See also *Amritrao Krishna Des Pande v. Balkishna Ganesk Amra Pekar*,

I. L. R., XI Bom., 488, at pages 490, 491. It must also be conceded that in order to decide whether the case is a fit one for the exercise of the powers of revision the Court must look into the facts and have power to do so. These points being conceded, it would be an absurdity to say that the Court cannot consider facts in giving its final order in the case.

Lastly, such power has been exercised by the superior Courts in many instances:—*Shields v. Wilkinson*, *I. L. R.*, IX All., 398, No. 68, *Punjab Record*, 1897.

In this case both the Courts below have given their opinion on the evidence, though the Divisional Judge has acted with material irregularity in mixing up irrelevant matters and in laying down the burden of proof. There is no necessity whatever for returning the case to the latter for a fresh judgment on the evidence. Further, in our opinion the defendant has entirely failed to prove breach of the conditions of the agreement between him and the plaintiff arrived at in the Criminal Court in 1894, or to show that plaintiff has been guilty of any immorality. Under these circumstances the plaintiff is entitled on the present record to the decree which she obtained in the Court of first instance, and this relief should be given her.

We treat this case as an application for revision, and accepting it set aside the decree of the Divisional Judge, and restore that of the first Court with all subsequent costs.

Application allowed.

No. 42.

Before Mr. Justice Chatterji and Mr. Justice Gordon Walker.

MUHAMMADI AND OTHERS,—(PLAINTIFFS),—
APPELLANTS,

Versus

MUSSAMMAT JIWANI AND OTHERS.—(DEFENDANTS),—
RESPONDENTS.

} APPELLATE SIDE.

Case No. 308 of 1896.

Declaratory decree, suit for by reversioner—Speculative suit—Specific Relief Act, 1877, Section 42.

Plaintiffs sued for a declaration that, after the death of Mussammat J. who was at the time in possession of the property, with a widow's interest, they were entitled to succeed to it. Their suit was dismissed by the Divisional Judge on the ground that the widow had not done any act or made any alienation of the property which might raise an apprehension

of injury to plaintiffs' rights, there being no allegation that any denial of their rights was made before the institution of the suit.

Held, that the suit had been rightly dismissed.

Further appeal from the order of Khan Muhammad Hayat Khan, C S.I., Divisional Judge, Jullundur Division, dated 31st January 1896.

Browne for appellants.

Jaishi Ram, for respondents.

The judgment of the Court was as follows :—

7th June 1898.

GORDON WALKER, J.—Plaintiffs' suit is for a declaration that, after the death of Mussammat Jiwani (defendant), who is now in possession of the property with a widow's interest, they are entitled to succeed to it. The Divisional Judge has dismissed the suit on the ground that "the widow (Mussammat Jiwani) has not done any act or made any alienation of her husband's property which may raise an apprehension of injury to their (plaintiffs') rights.....It is not alleged that a denial was made before the institution of the suit.....It follows that, as against Mussammat Jiwani, plaintiffs have no cause of action according to their plaint, and as a decree for a declaration of right depends on the discretion of the Court, it seems to me that it cannot be said to be a sound exercise of discretion to pass a decree merely on the ground that such and such a person has made a verbal denial of plaintiffs' reversionary rights."

We think that the Divisional Judge has rightly dismissed plaintiffs' suit on these grounds, and that a plaintiff cannot, on a mere denial by some one of his title as reversioner, there being no overt act against or attempt to interfere with his reversionary rights, obtain from the Court a declaration under Section 42 of the Specific Relief Act. Such a suit would be purely speculative in its nature, the plaintiff merely seeking to obtain from the Court an expression of opinion as to what his title would be under a condition of circumstances which may never arise.

In *Punjab Record*, 94 of 1879, the question was considered as regards the law (Section 15 of Act VIII of 1859) in force before the passing of the Specific Relief Act. In the case *Bhujendro Bhusan Chatterjee v. Tregunanath Mukerjee and others* reported at VIII Calc., page 76, the change introduced by the Act is noticed, and with regard to the provisions of Section 42 it is observed in the judgment in that case that "to hold other-

“wise (that is, to hold that a declaratory decree should be given in a suit of the nature of that under consideration), would be to lay down that any one who claims any interest in property, present or future, ought to be allowed to ask the Court to give him an opinion as to his title, and it cannot, I think, have been the intention of the Legislature to lay down any such rule” (Wilson, J).

We think, therefore, that the Divisional Judge is right in holding the plaintiffs in this case not to be entitled to the relief asked for, and that their claim has been rightly dismissed.

The appeal is dismissed with costs.

Appeal dismissed.

No. 43.

Before Mr. Justice Frizelle, Chief Judge.

KHUSHALI MAL,—(PLAINTIFF),—PETITIONER,—

Versus

**PALA MAL AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.**

} **REVISION SIDE.**

Case No. 700 of 1898.

Civil Procedure Code, 1882, Section 136—“Decree”—Appeal.

An order under Section 136 of the Civil Procedure Code, dismissing a suit is a decree from which an appeal lies.

Petition for revision of the order of S. S. Harris, Esquire, Additional District Judge, Ferozepore, dated 24th January 1898.

Harris, for petitioner.

The judgment of the learned Chief Judge was as follows :

FRIZELLE, J.—The dismissal of the suit under Section 11th June 1898. 136 was a decree from which an appeal lies—*vide I. L. R., VII All., 159*. This application for revision therefore cannot be entertained, and is rejected.

Application dismissed.

No. 44.

Before Mr. Justice Reid.

APPELLATE SIDE. {

BASHESHAR DAS,—(PLAINTIFF),—APPELLANT,

*Versus*BHAGWAN DAS AND ANOTHER,—(DEFENDANTS),—
RESPONDENTS.

Case No. 517 of 1898.

Mortgage deed relating to immoveable property—Deed compulsorily registrable, but registered in wrong Registry Office—Admissibility of deed in evidence—Registration Act, 1877, Section 49—Fraud.

Held, that the mere fact that a mortgage-deed, which is compulsorily registrable, has been registered in a wrong Registry Office, does not render such deed inadmissible in evidence as against a purchaser at execution sale of the land mortgaged, who, not knowing that such land was subject to mortgage, does not plead that he was misled by the deed not being registered at the proper office, or that he was induced to purchase because, on inquiry, at the latter office, he learnt that there was no outstanding incumbrance.

A plea that the said mortgage was in fraud of creditors, *held*, not established.

Further appeal from the order of J. A. Anderson, Esquire, Divisional Judge, Amritsar Division, dated 12th February 1898.

Lajpnt Bai, for appellant.

Dharam Das, Suri, for respondents.

The facts of the case sufficiently appear from the following judgment delivered by—

15th July 1898.

REID, J.—Mula, respondent, was mortgagee, with possession of certain land in the Gurdaspur District, under two deeds, dated August 1883 for Rs. 99 and Rs. 72, and obligee under a bond dated July 1892 for Rs. 140.

On the 30th August 1893 he transferred his rights under these three deeds for Rs. 200 to the appellant, Bashesar Das, son of his sister's daughter, by sale deed registered at Amritsar on the 30th August 1893.

On the 26th July 1895 the respondent, Bhagwan Das, obtained an *ex-parte* simple money decree against Mula for Rs. 94-6-3, including costs, and on the 8th August 1895 applied for execution, by attachment of the judgment-debtor's right under the above-mentioned mortgages, and eventually purchased the same in execution and obtained possession. The appellant objected, but his objection was overruled. He filed a suit, for possession of the mortgaged land, which has been

dismissed by the lower Appellate Court on the ground that the transfer was fraudulent and with the object of defeating the creditors of Mula, and also, apparently, on the ground that the sale-deed in favour of Basheshar Das was inadmissible in evidence under Section 49 of the Registration Act, being compulsorily registrable, and not having been registered, in accordance with law, in an office within the jurisdiction of which some part of the mortgaged property was situate. The first plea taken in appeal is that the sale-deed was not compulsorily registrable, the mortgage-deeds being moveable property. No authority has been cited in support of this plea, which must be overruled. A transfer of two mortgages of land aggregating Rs. 171 obviously purports or operates to create and assign an interest of the value of more than Rs. 100 in immoveable property.

The next plea is that registration in the wrong office does not render the sale-deed inadmissible in evidence.

67, *Punjab Record*, 1883, *Sheo Shunkur Sahoy v. Hirdey Narain Sahu*, I. L. R., VI Calc., 25, *Ram Coomar Sen v. Khoda Neway*, VII Calc., L. R., 223, and *Har Sahai v. Chuni Kuar*, I. L. R., IV All., 14, are relied on, and are authority for holding that when registration has been effected in the wrong office the fault is the Registrar's and the deed is admissible in evidence. *Beni Madhab Mitter v. Khatir Mondul*, I. L. R., XIV Calc., 449, is authority to the contrary, and there is force in the contention relied on in that case, that the judgment of their Lordships of the Privy Council in *Sah Mukhan Lall Panday v. Sah Koondun Lall*, XV B. L. R., 228, relied on in VII Calc., L. R., dealt with a case in which registration was in the right office, but in the absence of some of the parties to the deed.

67, *Punjab Record*, 1883, dealt with a case in which a son, who had full knowledge of a mortgage-deed executed by his father and registered in a sub-district office within the local jurisdiction of which the property was not situate though it was situate in the same district, sought to set aside the mortgage-deed as invalid for defect of registration. The appeal was to a great extent decided on the ground that the plea did not lie in the mouth of the son, who had knowledge of the deed. There is a similar qualification in the other cases quoted for the appellant, except in the C. L. R. case, in which the purchaser at execution sale of the property mortgaged, apparently without knowing that it was subject to mortgage, did not plead that

he was misled by the mortgage-deed not being registered in the proper office, or that he was induced to purchase because, on inquiry at that office, he learnt that there was no outstanding incumbrance. He simply sought to get rid of the deed through a defect in registration.

The respondent, Bhagwan Das, is in exactly the same position, and I see no reason to hold that the registration at Amritsar was not effectual for the purposes of Section 49 of the Registration Act. The question whether there was fraud is of course affected by the registration at Amritsar, and it is contended that the transfer, for Rs. 200, of securities worth Rs. 311, coupled with the failure to register at the proper office and the near relationship of the parties to the deed, proves fraud.

The transferee admittedly lives at Amritsar and the land mortgaged is admittedly not far from that town, though in another district, and there was room for reasonable doubt as to the sale-deed being compulsorily registrable. Had there been fraud, it was as easy for Rs. 311 to have been entered in the deed as for Rs. 200, and it has not been shown that Mula was so heavily involved in 1890 or 1893 that the transfer could be assumed to be in fraud of creditors, and lastly it has not been shown that Rs. 311, or anything like that sum, could have been realised by the transferee.

The relationship must of course be considered, among other matters, in deciding the question of fraud or no fraud, but on the facts I see no reason for holding that the transfer was fraudulent. Had the objection been taken by a collateral, seeking to set aside an alienation of ancestral property by registered deed the matter would have been very different, but, as it is, I think the Court of first instance rightly held that the sale-deed was in lieu of a debt some years antecedent to its execution and still further antecedent to the decree of the respondent, Bhagwan Das, and effected a transfer of the mortgagee rights in the land in suit.

I decree the appeal with costs here and below. If Registrars and Sub-registrars did their duty under Sections 66 and 67 of the Act, it would be practically immaterial in which office registration is effected.

Appeal allowed.

No. 45.

Before Mr. Justice Reid.

SAWAN MAL,—(PLAINTIFF),—APPELLANT,

Versus

DEVI DIAL AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

} APPELLATE SIDE.

Case No. 632 of 1898.

Oaths Act, 1873, Section 11—Evidences given by person on oath, effect of, as regards person offering to be bound thereby—Civil Procedure Code, 1882, Section 562.

Under Section 11 of the Oaths Act, 1873, the evidence given by a person on oath is, as regards the party who offered to be bound thereby, conclusive proof merely of the matter stated and of nothing further.

Where, therefore, in a suit by plaintiff for Rs. 550 profits lost by plaintiff through the default of N. C. and another, defendants, to deliver gram during one month at contract rate, and for Rs. 80 earnest-money paid to N. C., it appeared that one D. D., defendant, who made the contract as a broker and was alleged to have been a surety for its due performance, challenged N. C. to the oath, saying that if N. C. would swear that he (N. C.) had not received the earnest-money, he himself would be responsible for the plaintiff's claim, and the said N. C. thereupon swore that he had not received the said earnest-money, *held*, that such statement, on oath, merely concluded the question whether N. C. had or had not received such earnest money.

Held, therefore, that the first Court had erred in regarding the oath so taken as *per se* sufficient ground for decreeing the suit as against D. D., and dismissing it as against the other defendants.

Held, further, that inasmuch as the first Court had decreed the suit merely on the oath taken, and had not decided any of the five issues which it had framed, the lower Appellate Court had rightly remanded the case under Section 562 of the Civil Procedure Code.

Miscellaneous further appeal from the order of J. A. Anderson, Esquire, Divisional Judge, Amritsar Division, dated 9th May 1898.

Robinson, for appellant.

Madan Gopal and Sham Lal, for respondent.

The following judgment was delivered by—

REID, J.—The plaintiff-appellant and Devi Dial, defendant-respondent, agreed to be bound by the oath of Nihal Chand, defendant, if he would swear that he had not received Rs. 80 as earnest-money from the plaintiff. Devi Dial challenged Nihal Chand to the oath, saying that if Nihal Chand would swear that he had not received the earnest-money he himself

15th July 1898.

would be responsible for the plaintiff's claim, which included Rs. 550 profits lost by the plaintiff through the default of Nihal Chand and another defendant to deliver gram during one month at contract rate, and Rs. 80 earnest-money paid to Nihal Chand.

Devi Dial himself and two other defendants were brokers, through whom the contract was made, and are also alleged to have been sureties for the due performance of the contract.

The plaintiff simply bound himself to abide by Nihal Chand's statement on oath, which was to the effect that he had not received Rs. 80 earnest-money for gram on account of the plaintiff.



were discussed in the judgment.

The first point taken in appeal is that the suit was not decided on a preliminary point, and that Section 562 is therefore inapplicable. Of five issues framed by the first Court, not one was decided. I must, therefore, hold that the decision on the oath was a decision on a preliminary point.

The next point taken is that the Court of first instance was right in decreeing the claim in full against Devi Dial on Nihal Chand's oath. Against this contention there are two authorities, *Vasudeva Shanbog v. Naraina Pai*, I. L. R., II Mad., 356, and *Muhammad Zahur v. Cheda Lal*, XIV All., 141.

In the Madras case it was held that the mere agreement of one of the parties to a judicial proceeding to be bound by the oath of the other is in itself no adjustment of the suit, and that, if the matter stated in the agreement is sufficient, as the ground of a decision, a judgment may be passed, for then it would be conclusive evidence under the Oaths Act.

In the Allahabad case Straight, J., said "the Oaths Act does not constrain a Court to pass a decision in favour of a particular party. If a party to a suit says he will be bound by the oath of a particular person, as read by the light of Section 11 of that Statute, it means no more than this, that *pro tanto* he will be bound, that is to say, so far as the matter of that evidence is concerned, and that evidence will be conclusive as to its truth, and the truth of that evidence will be conclusive as against him throughout the whole of that litigation.....The Court.....may act solely upon that evidence.....but, on the other hand, it may be unwise in some cases to do so."

It is possible that the non-receipt of earnest-money by Nihal Chand is fatal to the plaintiff's claim, either as proving that the transaction was one of gambling, or that there was no complete contract, but the Court of first instance has not discussed and decided this question.

I think there can be no doubt that Nihal Chand's statement, on the oath taken, concluded only the question whether he had or had not received the earnest-money in question, and in that view the lower Appellate Court rightly remanded the suit. It is obvious that the Oaths Act does not contemplate that the evidence given on oath shall, as against the person who offered to be bound by it, be conclusive proof of anything beyond the matter stated. Section 11 is clear on that point. The appellant's offer to be responsible for the whole claim was outside the scope of Chapter IV of the Oaths Act. The appeal is dismissed. Counsel for the principal defendants, who have been made respondents, asks for costs on the ground that his clients have been unnecessarily made respondents. Having regard to their conduct throughout the suit, I do not think they are entitled to costs. The appellant will pay the costs of the plaintiffs-respondents.

Appeal dismissed.

No. 46.

Before Mr. Justice Chatterji and Mr. Justice Anderson.

APPELLATE SIDE. { MUSSAMMAT NEKHAN,—(DEFENDANT),—APPELLANT,
Versus
MUHAMMAD KHAN AND OTHERS,—(PLAINTIFFS),—RESPONDENTS.

Case No. 887 of 1897.

Punjab Courts Act, 1884, Sections 26, 75—"Business" and "functions" of District Court—Power of District Judge to assign function of trying a case to Additional District Court—Case in excess of pecuniary limits of latter Court's jurisdiction.

Section 75 of the Punjab Courts Act must be construed in consonance with Section 26 of the Act, and it is, therefore, not competent to a District Judge by any act of his under sub-section (2) of Section 75 to extend the powers conferred on Judicial Officers by the Local Government under Section 26.

The "business in the Court of the District Judge" spoken of in Section 75 (1) of the Act means business it has to dispose of as the District Court, and the "functions" mentioned in sub-section (2) of the said section are functions proper to such Court and must be such as a Sub-Judge of the highest class is unable to discharge, and do not mean the mere trial of civil suits of the value of over Rs. 5,000.

First appeal from the order of Khan Bahadur Raja Jahandad Khan, Additional District Judge, Rawalpindi, dated 30th June 1897.

Pestonji, for appellant.

Beechey, for respondent.

The facts of the case sufficiently appear from the judgment of the Court delivered by

13th June 1898.

CHATTERJI, J.—This case was originally valued at Rs. 3,280-11-0 and was sent for trial to the Court of the Additional District Judge of Rawalpindi, Diwan Lakhmi Das. On his transfer it was taken up, inquired into and decided by his successor, Raja Jahandad Khan. While it was pending before Diwan Lakhmi Das, a commission was appointed for valuation of the subject-matter of the suit, and the value for purposes of jurisdiction was ultimately assessed at Rs. 7,369-4-1.

It is now objected in appeal that Raja Jahandad Khan had no jurisdiction to try the suit. It appears that the Raja's ordinary civil powers were those of a second class Subordinate Judge. By Punjab Government Notification

No. 118, dated 21st January 1897, he was appointed Additional District Judge of Rawalpindi, but by Punjab Government Notification No. 119 it was pointed out that his ordinary civil powers were limited as above. Apparently through inadvertence, the increase in the value of the suit, through the revised estimates of the commissioner, to a figure above the pecuniary limits of his jurisdiction was not noticed by the Raja when he disposed of it.

Mr. Beechey contends that the Local Government was not competent to limit the jurisdiction of the Additional District Judge and that on the District Judge assigning the function of trying the suit to Raja Jahandad Khan he became for the purpose of discharging such function a District Judge with all the powers of a District Judge under the Punjab Courts Act, which are unlimited. He further argues that if there is no order of the District Judge specially sending the case to the lower Court for disposal the fact that the case remained under trial in that Court to the knowledge of the District Judge without objection is tantamount to an order assigning the function of trying it to the Court, which need not be expressed in writing.

We cannot accede to this contention. It is obvious that the business in the Court of the District Judge spoken of in Section 75, sub-section (1) of the Punjab Courts Act means business it has to dispose of as the District Court, and the functions mentioned in sub-section (2) are functions proper to such Court, and the mere trial of civil suits of the value of over Rs. 5,000 is not intended. For the trial of such suits it is not necessary that the Court should be a District Judge. A Sub-Judge of the first class would be competent to hear them. The aid of an Additional District Judge is not required for this purpose. The functions meant in sub-section (2) must be such as a Sub-Judge of the highest class is unable to discharge and which must be performed by a Court having the status of a District Court, *e.g.*, the disposal of applications for certificates under the Succession Certificates Act, Guardian and Wards Act, insolvency cases under the Code of Civil Procedure and the like. Moreover, it would be a repugnant construction to hold that the powers conferred on Judicial Officers by the Local Government under Section 26 of the Act might be extended by an act of the District Judge under sub-section (2) of Section 75. We think it is proper to construe Section

75 in consonance with Section 26, as appellant's pleader argues.

We hold, therefore, that the defect of jurisdiction of the lower Court is established.

We accept the appeal and reverse the decree of the lower Court and return the case to the District Judge for trial by himself or some other officer of competent jurisdiction. Parties to pay their own costs up to date.

No. 47.

Before Mr. Justice Frizelle, Chief Judge.

APPELLATE SIDE. }

BUTA SINGH,—(JUDGMENT-DEBTOR),—APPELLANT,

Versus

CHANDA SINGH,—(DECREE-HOLDER),—RESPONDENT.

Case No. 372 of 1898.

Pre-emption—Decree directing money to be paid into Court by certain date but not stating consequences of non-compliance—Execution of decree—Limitation Act, 1877, 2nd Schedule, Article 179.

Where a decree in a suit for pre-emption directed that the sum for which pre-emption was decreed should be paid into Court by a certain date, but omitted to declare that if such sum was not paid on or before the said date, the suit should stand dismissed. *Held*, that such omission in the decree did not extend the time within which the plaintiff could pay the money, the plaintiff being bound nevertheless to pay the amount into Court within the time fixed.

In such a case when the plaintiff failed to pay the amount into Court within the specified time,

Held, that the decree had become one incapable of execution, and was not governed by Article 179 of the Limitation Act, which only applies to decrees capable of execution.

Miscellaneous appeal from the order of J. A. Anderson, Esquire, Divisional Judge, Amritsar Division, dated 14th March 1898.

Lal Chand, for appellant.

Rup Lal, for respondent.

The judgment of the Court was as follows :—

18th June 1898.

FRIZELLE, C. J.—This is an appeal from an order passed in execution of a decree for pre-emption. The judgment was in English and ordered that the amount for which pre-emption was decreed (Rs. 2,000) should be paid into Court by the 15th June. A decree was drawn up in English to the same effect, but not declaring that if the money was not paid on or before the specified date the suit should stand dismissed. A

decree in vernacular was also drawn up, and it declared that if the money was not paid by the date fixed the decree should be null and void (*kaladam*). The money was not tendered in Court until the 18th June, and the decree-holder stated in his application tendering it and asking for execution that as it was a large amount he was unable to raise it sooner. The first Court rejected the application for execution as the money had not been paid within time. On appeal the Divisional Judge reversed this order and ordered execution to issue on the ground that the decree did not state, as it ought to have done according to Section 214, Civil Procedure Code, that if the money was not paid within the prescribed time the suit should stand dismissed.

I am of opinion that this omission in the decree does not extend the time within which plaintiff could pay the money. The declaration as to the effect of non-payment within the prescribed time was merely one which the decree ought to have contained. But although it did not contain it plaintiff was nevertheless bound to pay the money within the time fixed, and when he did not do so it would be contrary to the decree to allow him to make the payment afterwards, and the decree consequently becomes one that he cannot execute. This view is in accordance with *I. L. R.*, XIV All., 529, and hardly requires any argument to support it. It follows from the very nature and terms of the decree. No decision has been quoted to the contrary. The one chiefly relied on for respondent is *Punjab Record*, No. 10 of 1895, but that does not touch on the question. It was a case in which no time was fixed for payment of the pre-emption money.

Respondent's pleader contends that the present case is governed by the ordinary limitation law regarding execution of decrees (Article 179 of the 2nd Schedule to the Limitation Act). But the decree now in question by providing that the money must be paid by a certain date, meant that it could not be executed after that date if the money was not paid, and as long as plaintiff did not get the decree altered he was only entitled to execution according to it. Article 179 can only apply to decrees which are capable of execution when the application is made, and not to decrees which are no longer of any force.

I have regarded the matter as if the English decree had been the only one and as if the vernacular decree should not be taken into consideration.

I set aside the order of the Divisional Judge and restore that of the first Court with costs.

No. 48.

Before Mr. Justice Frizelle, Chief Judge.

APPELLATE SIDE. { TEJ RAM AND OTHERS,—(PLAINTIFFS),—APPELLANTS,
Versus
TULSI AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

Case No. 674 of 1898.

Appeal—“Land suit”—Right in tank used for watering cattle and excavating earth to make bricks.

Plaintiff sued for declaration of right in a tank, valued at Rs. 900, which was used for watering cattle and excavating earth to make bricks.

Held, that, as these were not agricultural purposes or purposes subservient to agriculture, the tank was not “land” as defined in the Punjab Tenancy Act, and that, therefore, no further appeal lay.

Further appeal from the order of S. Clifford, Esquire, Divisional Judge, Delhi Division, dated 16th April 1898.

S. P. Roy, for appellant.

The judgment of the learned Chief Judge was as follows :

18th June 1898.

FRIZELLE, C. J.—No appeal lies in this case. The suit is for declaration of right in a tank valued at Rs. 900. The tank is used for watering cattle and excavating earth to make bricks. These are not agricultural purposes or purposes subservient to agriculture. The tank therefore is not land as defined in the Punjab Tenancy Act. Appeal rejected.

Appeal dismissed.

No. 49.

Before Mr. Justice Chatterji and Mr. Justice Anderson.

APPELLATE SIDE. { AULIA,—(DEFENDANT),—APPELLANT,
Versus
ALU,—(PLAINTIFF),—RESPONDENT.

Case No. 7 of 1897.

Custom—Alienation—Gift by sonless proprietor to first cousin who was also his uterine brother—Awans of tahsil Khushab, Shahpur District.

One M., a full proprietor, before his death executed a deed of gift of his land in favour of his first cousin, who was also his uterine brother, and put him in possession. The parties were Awans of mauza Mardwal, Khushab tahsil, Shahpur District.

Found, that the said gift was valid by custom

Further appeal from the order of D. O. Johnstone, Esquire, Divisional Judge, Jhelum, dated 26th August 1896.

Sham Lal, for appellant.

Miran Bakhsh, for respondent.

The judgment of the Court was delivered by

ANDERSON, J.—This was a case amongst Awans of *mauza* 25th July 1898. Mardwal, *tahsil* Khushab, District Shahpur. Before his death Makhana, a full proprietor, executed a deed of gift conveying 5 *bighas*, 2 *kanals*, 18½ *marlas* of land to his first cousin and uterine brother Mitha and put him in possession. The local *Wajib-ul-arz* provided that a sonless proprietor may during his lifetime give his estate to his daughter or daughter's son or *pichlag* son or one of his collaterals or adopted son provided that the gift be put in writing. The lower Court held this entry to be insufficient without proof of instances, but in accordance with the rulings contained in *Punjab Record*, No. 52 of 1896, its effect was to throw the burden of proof on the plaintiff. There were numerous instances in which a custom in favour of such gifts by Awans of Khushab *tahsil* has been upheld by this Court, *e.g.*, *Punjab Record*, Nos. 33 and 36 of 1891, where gifts in favour of sister's sons were set aside only because not completed by possession. In *Punjab Record*, No. 79 of 1896, a case from this identical village, it was held that a gift in favour of a wife's brother who was also a remote collateral was valid in presence of the donor's half brothers. The first Court then found (see page 252) that there were eight instances of gift in Mardwal itself.

In the case before us the lower Court has referred to a number of rulings as showing the custom of Awans (presumably relating to gifts), but most of these have no special application to the present case. In *Punjab Record*, No. 81 of 1894, it was held that amongst Awans of the Talagang *tahsil* of Jhelum District there was no custom authorizing a father to make a gift to his daughter in the presence of sons, a very different case from the present.

The Divisional Judge held that the decision of the lower Court on the point of custom was of course sound and considered that the appellant's pleader withdrew his fourth ground of appeal. If this was a fact the pleader certainly made a great mistake, as *Punjab Record*, No. 79 of 1896, was distinctly in favour of the existence of the custom set up by his client and relied on in his appeal.

It is unnecessary under the circumstances to consider defendant's second plea that he had spent money on behalf of Makhana in funeral expenses and payment of debts, in respect of which both Courts refused to allow him to produce evidence, holding him bound by the terms of the deed of gift, which naturally contained no allusions to payments which the defendant does not allege to have been made for many years subsequent to 1886. The defendant has an excellent case, having been put in possession in 1886 and the custom under which he claims having been well established, since he is a near collateral as well as a uterine brother of the donor.

We accept this appeal, set aside the decree and order that respondent bear appellant's costs throughout.

Appeal allowed.

No. 50.

Before Mr. Justice Chatterji and Mr. Justice Anderson.

MUSSAMMAT WAZIR BEGAM,—(DEFENDANT),—
APPELLANT,

Versus

MUSSAMMAT PIYARI BEGAM,—(PLAINTIFF),—
RESPONDENT.

APPELLATE SIDE. {

Case No. 355 of 1896.

Appeal—Civil Procedure Code, 1882, Sections 375, 622—Offer made by defendant pendente lite to settle case—"Compromise"—Decree based on plaintiff's acceptance of offer—Offer repudiated by defendant—Power of pleader to compromise suit.

Plaintiff's suit, which was filed on 7th May 1895, was in respect of one-third of the estate of one F. J., deceased, which plaintiff claimed as F. J.'s sister. On the 18th June the pleas of a co-defendant, who had taken part of the disputed property in mortgage from the real defendant, Mussammat W. B., deceased's widow, were filed, and the latter's advocate applied for, and obtained, an adjournment in order that a compromise might be come to. After another adjournment the case was fixed for the 15th October, on which date Mussammat W. B. was represented by a pleader who stated his oral pleas on her behalf and concluded with the words "If plaintiff is still willing to receive Rs. 2,000 in satisfaction of "all claims, defendant No. 1 is willing to pay. If not, she cannot recognize "any claim of the plaintiff."

Thereupon the parties appear to have applied for a further postponement in order that the case might be settled out of Court, and the 23rd October was fixed for the next hearing. On that date nothing was said on either side about any compromise or defendant's offer, but defendant's pleader got additional pleas on the merits recorded. The case was then adjourned (for no special reason) to the following day, when plaintiff's

recognized agent, acting on a fresh power-of-attorney, dated the day before and in supersession of a previous power in his favour, stated that plaintiff was willing to take Rs. 2,500 in full satisfaction of her claim and to forego costs. Defendant's pleader (who was other than the pleader through whom the offer of the 15th October had been made) replied that he had that day been instructed to say that his client did not agree to pay Rs. 2,500, and that if the Court gave a decree, it must be against the estate. To this plaintiff's pleader objected. The Court held that the offer of the 15th October was subject to no such qualification, and gave a decree in plaintiff's favour for Rs. 2,500 "on the pleadings as they stand." This decree was at first modified by the Divisional Judge, on appeal, but was subsequently restored by him on review. Defendant appealed to the Chief Court, and it was objected, on plaintiff's behalf, that the decree fell within the purview of Section 375 of the Civil Procedure Code, and was therefore final.

Held, that, whether or not the decree in the present case fell under the said section, the procedure of the District Judge was sufficiently tainted with material irregularities to justify interference under Section 622 of the Code.

Seemle :—Under the circumstances of the case an appeal was competent.

Held, that the material irregularities committed by the District Judge were (i) in stating that his decree was based on the pleadings, when in fact the said decree was not made with reference to any material allegation of fact or proposition of law relating to the subject-matter of the suit made or affirmed by one side and admitted by the other; (ii) even assuming that the Court had power to pass such a decree, in not enquiring, as it was bound to do, into the objections of defendant, whose pleaders should have been asked whether his repudiation meant that the original offer had not been made with authority or merely that it was withdrawn and the acceptance too late; (iii) in not making any inquiry as to whether defendant's pleader had express authority to make the offer of the 15th October; (iv) in assuming that the said offer was still binding on the 24th October, and in proceeding to pass a decree in accordance with its terms without further inquiry.

Held, therefore, that the decrees of the lower Courts must be set aside.

A pleader has not power without express authority from his client to bind him by a compromise.

Further appeal from the order of Colonel C. H. T. Marshall, Divisional Judge, Lahore Division, dated 14th March 1896.

Lal Chand and Browne, for appellants.

Ali Hussain, for respondent.

The judgment of the Court was as follows :

CHATTERJI, J.—The material facts are briefly these. The 27th July 1898. plaintiff, Mussammat Piyari Begam, claimed one-third of the estate of the late Fakir Jamal-ud-din as his sister. The suit

was filed on 7th May 1895. On 18th June the pleas of a co-defendant who had taken part of the disputed property in mortgage from the real defendant, Mussammat Wazir Begam, the deceased's widow, were filed, and Mr. Amin-ud-din, her advocate, asked for, and obtained, an adjournment in order that a compromise might be come to. After another adjournment the case was fixed for the 15th October. On that date Maulvi Fazl Din appeared for Mussammat Wazir Begam and stated his oral pleas on her behalf which wound up with these words, "If plaintiff is still willing to receive Rs. 2,000 in satisfaction of all claims, defendant No. 1 is willing to pay. If not she cannot recognize any claim of the plaintiff." According to the District Judge's autograph record the parties then again applied for a postponement in order that the case might be settled out of Court, and the 23rd October was fixed for the next hearing. On that date Lala Gobind Ram appeared for the plaintiff and Messrs. Lal Chand and Fazl Din for the defendant. Nothing was said on either side about any compromise or defendant's offer of the 15th October, but Mr. Lal Chand got additional pleas on the merits recorded. The case was then put off for the next day without any special reason. On the 24th Sayad Akbar Ali, recognized agent of the plaintiff, acting on a fresh power-of-attorney dated the day before and in supersession of a previous power in his favour, stated that plaintiff was willing to take Rs. 2,500 in satisfaction of her claim and to forego costs. Mr. Lal Chand's reply was that he had been that day instructed to say that his client did not agree to pay Rs. 2,500, and that if the Court gave a decree it must be against the estate. To this plaintiff's pleader objected. The Court held that the previous offer made by Maulvi Fazl Din was subject to no such qualification and gave a decree in plaintiff's favour for Rs. 2,500 "on the pleadings as they stand."

This decree was appealed to the Divisional Judge, who at first made some strictures on the procedure adopted by the District Judge and modified the decree by converting it into one against the estate of the deceased. On review, however, he restored the original decree of the District Judge.

The first question for consideration is whether the decree was one based on a simple confession of judgment or on a compromise within the meaning of Section 375, Civil Procedure Code. In our opinion the decree was not of the former

character, as the defendant did not admit any part of the claim as laid but made an offer of a lump sum in satisfaction of the same. The decree partakes of the nature of one founded on a compromise, but owing to the peculiar procedure adopted by the District Judge it is difficult to say that it falls within the purview of Section 375, Civil Procedure Code, and is on that account final. The majority of the Chartered High Courts and this Court are agreed that when a compromise has been agreed upon between parties to a suit, the Court can proceed under Section 375 even if one of the parties withdraw or refuse to admit that there has been a compromise, and that it can inquire and decide whether in fact a compromise has been effected or not. But it is extremely doubtful whether a decree passed under the circumstances of the present case, where in fact an offer is made on a particular date by one party without specifying the time for acceptance, and when after several days the other party notifies its acceptance which the first party declines to accept as too late, but which the Court nevertheless treats as binding, can be said to fall under Section 375. The point is of importance only to see whether an appeal is competent. We are disposed to hold that it is. Even if it were otherwise and the decree held to be one falling under Section 375, we are of opinion that the procedure of the District Judge is sufficiently tainted with material irregularities to justify our interference under Section 622, Civil Procedure Code.

The first error to be noticed is that the District Judge says that his decree is based on the pleadings. This is not the case. The decree is not made with reference to any material allegation of fact or proposition of law relating to the subject-matter of the suit made or affirmed by one side and admitted by the other. It professes to be founded on an offer of something outside the subject-matter of the suit by defendant No. 1 which the Court holds has been converted into a promise by the acceptance of the plaintiff; that is, on a cause of action, so to speak which has come into existence since the filing of the plaint. As a general rule such causes of action cannot be taken cognizance of in the suit. One exception, if it may be so called, is where the parties come to an agreement with reference to the subject-matter of the suit and certify the same in Court. In such a case under certain limitations Section 375, Civil Procedure Code, allows the suit to be disposed of in accordance with the agreement or adjustment. It has also been held that where an agreement has actually been arrived at,

but one party. unjustifiably withdraws therefrom and refuses to certify it, the Court has power to inquire and to give effect to it. Here however the parties admittedly came to no agreement, but the Court held that the offer of the defendants could not be withdrawn, and that the plaintiff's acceptance was valid, and by operation of law converted the offer into a promise which it enforced by giving a decree. The allegation of an agreement completed in *fact* appears to be a condition precedent to the Courts taking action under Section 375, Civil Procedure Code, either to give effect to it at once or to enquire whether the allegation is true or not. But there appears to be no warrant in that section or in any other of the Code of Civil Procedure for the Court to decide whether an offer *pendente lite* of something outside the subject-matter of the suit has been lawfully converted into a promise by the acceptance of the other party and to pass a decree in accordance with such promise or offer.

Again, assuming that the Court had jurisdiction to pass such a decree it was bound to enquire into defendant's objections before doing so. The procedure has been too summary, the case has been, to use the language of the Divisional Judge, " 'rushed' through without sufficient care to make all clear." Mr. Lal Chand should have been asked whether his repudiation meant that the original offer had not been made with authority, or merely that it was withdrawn and the acceptance too late.

The offer was made by Maulvi Fazl Din, a pleader, and there is nothing on the record to show whether the defendant, a *pardanashin* lady, gave him express or implied authority to make it. In the absence of such authority Maulvi Fazl Din was not empowered to do so. It is well settled law that a pleader has not power without express authority from his client to bind him by a compromise as advocates have (*Prem Sukh v. Pirthee Ram and others*, II Agra, 222; *Mussammatt Sirdar Begum v. Mussammatt Issat-ul-nissa*, 11 N.-W. P., 149. See also *Asril Khadar and three others v. Audhu Set*, II Mad. H. C. Rep., 423, and *Jang Bahadar Singh, &c., v. Shankar Bai, &c.*, I. L. R., XIII All., 272, F. B. Mr. Ali Hussain has quoted two old authorities, but they do not militate against the view taken in the case last cited by the Full Bench of the Allahabad Court. Nor is the reference to the judgment of the Privy Council reported in Volume II of Moore's *Indian Appeals* in point. Mr. Ali Hussain also contends that Maulvi Fazl Din's power-of-attorney

gives him such power, but the words *sakhta pardakhta sahib mauzaf ka misl-i-karda-i-zat-i-khud bakar-i-nahij manzur aur kabul hoga* have reference to what goes before, viz., *waste pairwi wa jawab dehi aur wasuliat rupiya ke, &c.* They do not empower the pleader to compromise the suit or to make an offer of this kind, and we do not recollect any instance where they have been so interpreted. The point for inquiry therefore was whether the offer itself was repudiated, and if so, whether it was made on sufficient authority. It was possible that Maulvi Fazl Din, though not so empowered by the written authority, was specially instructed to make the offer, but this was a matter of evidence and required the statements of Maulvi Fazl Din and the lady to be taken in order to enable the Court to come to a right decision. The Court, however, entirely failed to question Mr. Lal Chand as to the real meaning of his objection, and to make the above inquiry if the power to make the offer was denied.

The point next to be considered is whether the offer remained open until the 24th October, when it was accepted by the plaintiff. It was informal in its language and fixed no time within which the plaintiff had the option of accepting it. The parties that very day got an adjournment of eight days for the ostensible purpose of arranging a compromise, and it may be naturally inferred that they had this offer in view when they made the application, and that the offer was to remain open for this time. On the 23rd October, however, the parties appeared and said nothing about any compromise having been effected or being under discussion. On the contrary, the defendant engaged new counsel, Mr. Lal Chand, and had fresh pleas on the merits recorded. No reservation whatever of any kind was made by either party with regard to the offer. Looking at the proceedings of that day, the only conclusion that can be arrived at is that the efforts at settlement had proved abortive. The plaintiff notified her acceptance the next day, but the defendant's counsel immediately repudiated it, stating that he had been instructed to do so by his client. Having regard to all the circumstances, we are of opinion that he was within his rights in refusing to be bound by the offer at the time the acceptance was notified. Obviously it could not remain open indefinitely, and the proceedings of the 15th October indicate that it was to hold good at the outside for the term of the adjournment, and those of the 23rd October show that the parties or at least the defendant No. 1 did not then regard it as operative. Had the plaintiff then regarded the offer a

open she would have asked that the additional pleas on the merits might not be taken down, or for further time to make up her mind. It does not appear probable, nor has it been stated that the sole difficulty of the plaintiff was that she had no duly authorized recognized agent. Had this been the case the matter would have been brought to the Court's notice and further time obtained. However this may be, the District Judge did not bestow the least thought on these matters, or on the question whether the offer was still binding, and proceeded to pass a decree in terms of the offer. In our opinion he had no power to do so, and in acting thus his proceedings were tainted with material irregularity.

However much a compromise in a case like this may be desirable, and however much we may be disposed to regret, on that account, our inability to uphold the decree, there can be no doubt that a compromise cannot be brought about in this fashion. The hastiness of the District Judge's procedure is mainly accountable for the present unsatisfactory state of the case.

The decrees of the lower Courts must be set aside and the case must be enquired into on the pleadings unless the parties terminate the litigation by a fresh lawful adjustment.

We accept the appeal, reverse the decrees of the lower Courts, and return the case to the District Judge for inquiry and a fresh decision with reference to the above remarks. Court-fee on the petition of appeal will be refunded. Parties will pay their own costs up to date.

Appeal allowed.

No. 51.

Before Mr. Justice Chatterji and Mr. Justice Anderson.

SANSAR SINGH AND ANOTHER,—(PLAINTIFFS),—
APPELLANTS,

Versus

TILOKA AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

Case No. 244 of 1896.

Document, construction of—Registration Act, 1877, Sections 17, 49—Partnership or co-ownership—Abandonment—Estoppel—Limitation Act, 1877, 2nd Schedule, Articles 142, 144.

Plaintiffs sued for an account of the income and expenditure of a certain *kul* (or water-course) jointly excavated by the parties under an agreement in writing, dated 24th February 1873, whereby it was agreed, *inter*

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alia, that, in consideration of half the outlay in excavating the *kul*, which originally belonged to defendant and his ancestors but had fallen into disrepair and become useless, the plaintiff was to become a half-sharer therein : that thenceforth the income and expenditure on the *kul* was to be shared in the same proportion, and that in the event of a sharer failing to pay the expenses of repairs, he was to be debarred from participating in the income of that year. Defendants admitted the agreement and rendition of accounts till 1936 *Sambat*, but alleged that after that year the *kul* was stopped and litigation ensued with the owners of certain villages; that plaintiff refused to contribute towards the expenses and gave up his share; and that defendants had conducted the cases themselves and enjoyed the profits of the *kul* ever since. The District Judge dismissed the suit on the ground that plaintiff, by refusing to contribute towards the expenses of the said litigation and by his subsequent conduct, had abandoned and lost his rights in the *kul*. This decree was upheld, on appeal, by the Divisional Judge, both on the ground that plaintiff had abandoned and lost his said rights, and also that his conduct estopped him from preferring the present claim.

Plaintiff having appealed to the Chief Court, the defendants supported the decree of the lower Courts, not only on the ground of abandonment and estoppel, but also on the grounds (a) that plaintiff's rights in the *kul* could not be proved, as the written agreement of 1873 required registration, and being unregistered was inadmissible in evidence; (b) that the suit was practically one for accounts of a partnership, and therefore could not lie without a prayer for dissolution; and (c) that the failure of plaintiff to contribute towards the expenses of repairs debarred him from claiming a share of the produce for any of the years for which accounts were claimed.

Held, that the claim was one relating to profits of immovable property, and that the right in respect of which the parties were litigating and which formed the basis of the claim was one regarding such property, and that, therefore, the limitation for the possession of a share in the *kul* would be 12 years whether under Article 142 or Article 144 of the Limitation Act.

Found, upon the evidence, that there was no proof of abandonment on the part of plaintiff.

Held, further, that the written agreement of 1873 did not require registration inasmuch as, taken as a whole, it meant nothing more than that the defendant agreed to give plaintiff a half share in the *kul* provided that the latter paid a half share of the expenses of excavation, and that such a condition did not create a present right in the *kul*, but merely one that would come into existence in the event of plaintiff fulfilling the said condition.

Held, also, that even if it were conceded that a present right was created by the instrument, it was only a right in the ruined *kul*, which had at the time no value at all and certainly could not be said to have been worth Rs. 100, and that the valuable property which might come into existence if the conditions of the agreement were carried out could not be held to furnish the test of valuation.

Section 17 of the Registration Act must be strictly construed, and unless a document is clearly brought within the purview of the section, it

cannot be excluded from evidence, and, in case of doubt, the benefit must be given to the document.

Held, upon the facts of the case, that the claim was one for accounts of a co-ownership in immovable property, and not of a partnership.

Held, finally, that the agreement, rightly construed, only deprived a co-sharer of the income in case he *refused* to pay his *quota* of expenses of repairs, &c., and that mere *non-payment* did not amount to such refusal, though defendant was entitled to deduct the amount of the said expenses from plaintiff's share of the profits.

Further appeal from the order of T. Troward, Esquire, Divisional Judge, Amritsar Division, dated 27th November, 1895.

Lal Chand, for appellants.

K. P. Roy and Jaishi Ram, for respondents.

The judgment of the Court was delivered by

26th July 1898.

CHATTERJI, J.—This was a suit for an account of the income and expenditure of a *kul* or water-course jointly excavated by the parties under an agreement in writing dated 24th February 1873. The main conditions entered in that document were that in consideration of his contributing half the outlay in excavating the water-course which originally belonged to defendant No. 1 and his ancestors, but had fallen into disrepair and had become useless, the plaintiff was to become a half sharer in the *kul*, that in future the income and expenditure on the *kul* was to be shared in the same proportion, and that in case a sharer failed to pay the expenses of repairs he was to be debarred from participating in the income of that year.

Plaintiff alleged that accounts had been settled up to 1940 but not since that year, and that defendant had refused to render them as the *kul* had become very profitable.

The defendant admitted the agreement and the rendition of accounts up to 1936 *Sambat*, but alleged that after that year the *kul* was stopped and litigation ensued with the owners of certain villages, that plaintiff refused to contribute to the expenses and gave up his share, and that defendant No. 1 had conducted the cases himself and enjoyed the profits of the *kul* ever since. He also urged certain legal objections which it is unnecessary to set out here as they will be noticed further on in the judgment. Tiloka is the real defendant in the case, and the word will be understood to refer to him alone.

The District Judge of Gurdaspur who tried the suit as the Court of first instance found defendant's allegations proved in the main and that the plaintiff by refusing to contribute towards the expenses of the litigation relating to the *kul* in

1882-83 and by his subsequent conduct had abandoned his rights and lost them. He therefore dismissed the suit. His decree was upheld by the Divisional Judge, who agreed with him that abandonment on the part of the plaintiff was proved, and further that he was estopped by his conduct from preferring the present claim. The plaintiff appeals.

We have heard counsel at great length and considered the evidence, and in our opinion the finding of the Divisional Judge as to abandonment and estoppel cannot stand.

We must premise that in our opinion the claim is one relating to profits of immovable property, and the right in respect of which the parties are litigating and which forms the basis of the claim is one regarding such property. The limitation for the possession of a share in the *kul* would be 12 years whether under Article 142 or 144 of the Limitation Act. It would be only after the lapse of that period after plaintiff's dispossession or discontinuance of possession or after defendant's possession had become adverse that the plaintiff's title to the joint ownership of the *kul* would be extinguished.

Mr. Lal Chand's argument is (1) that admittedly the parties became joint owners under the agreement of 1873 and enjoyed the profits in common till 1936; (2) that in 1883 after the close of the litigation regarding the *kul* the defendant applied for mutation of names in his own favour, and, on plaintiff's objecting on the ground of his being a co-owner, conceded that he had a half share, provided he paid half the expenses of the said litigation, about Rs. 1,400; (3) that in 1886 plaintiff called as a witness by the defendant in another case asserted his right; (4) that in 1940 *Sambat* accounts were rendered; (5) that defendant wrote a letter on 15th May 1889 admitting plaintiff's right and promising to render accounts; and (6) that in 1892 when plaintiff was sued by defendant for price of grain delivered, plaintiff set up his right to the *kul*, which was found to be established by the Court, though his claim to set off the value of the grain against his dues on account of the income of the property was disallowed. He contends that plaintiff's right was nowhere definitely denied, that defendant's possession as that of a joint owner was not adverse, and that plaintiff never abandoned his rights and is not estopped from claiming his share in the *kul*.

We think the evidence and the admissions of the defendant in this and in the previous proceedings prove that though the defendant attempted to get mutation of the *kul* in his sol-

name in 1883, he admitted plaintiff's half share, and only asserted that plaintiff could get it only on payment of half the expenses which he, defendant, had incurred in litigation and not otherwise. This is not a denial of plaintiff's right, but a distinct acknowledgment of it coupled with a counter claim for money. It is also proved that accounts were rendered up to 1940 *Sambat*, but it is not established that they were finally settled. The rendition of accounts shows that there was then no denial of title to the property, though the parties were not agreed about the details of the account. The exact date when this took place is not clear, but it brings us down to about 1885. This is quite sufficient to save limitation as regards the right to the property even if we are to exclude from consideration the letter of 1889 and time be held to run from the date of the quarrel relating to the account. But in fact a dispute regarding the details of the account does not amount of itself to a denial of the right to the property, and there is no clear proof of such denial until we come to the case of 1892. This suit was filed on 11th July 1893.

The plaintiff has undoubtedly shown great delay in bringing his suit, but as his right is not extinct his claim is not barred. We find no tangible proof of abandonment on his part, nor would abandonment bar his claim unless 12 years have elapsed thereafter (No. 85, *Punjab Record*, 1892, F. B.). In 1883 he asserted his claim, and again in the case of 1886 and when accounts from 1936 to 1940 were attempted to be made up. Nor do the facts establish any estoppel. We entirely disbelieve the story of his renunciation before the litigation began as well as the genuineness of the copy of the letter alleged to have been sent by Mahtaba in 1880. Plaintiff reiterated his claim several times after 1880, and the defendant said nothing about his giving up his rights in the mutation proceedings. None of the authorities quoted by respondent's counsel on the question of abandonment or estoppel is in point. Defendant knew well that plaintiff had not relinquished his right and was put to no disadvantage in consequence of any misconception of his attitude as regards the *kul* due to any act or omission of his. Defendant brought suits for *abiana* and repaired the *kul*, but these were mere acts of management and not due to plaintiff's conduct. The grounds on which the suit has been dismissed by the Divisional Judge therefore fail.

Defendant's counsel has in this Court urged other objections in support of the decree of the lower Court, and these

must be discussed. One is that the plaintiff's right to the *kul* cannot be proved, as the agreement of 1873 required registration and is inadmissible for want of it. After giving the matter our best consideration we are of opinion that the objection is not substantiated. The case is in many respects analogous to No. 16, *Punjab Record*, 1895, and the distinctions attempted to be drawn by respondent's counsel are not made out. Rationally construed no right, present or future, vested or contingent, was *at once* created by the document. The only words that lend any color to the respondent's contention are *hamrah Ram Singh ke shurakat moqarrir kar ke nisfi hissa ka sharik moqarrir kar lia hai*, but the first part relates to the expenditure in excavating the water-course and the second has to be read with words that follow a little later, *viz.*, "*badin shara'it, &c.*" Taken with the whole deed they mean nothing more than that the executants agreed to give Ram Singh a half share, provided he paid half the expense of digging the *kul*. As in the document in No. 16, *Punjab Record*, 1895, such a condition did not create a present right, but one that would come into existence in the event of Ram Singh fulfilling the condition of defraying half the costs of excavating the *kul*. Even if it be conceded that a present right was created it was only in the ruined *kul* which had no value at all and which certainly cannot be said to have been worth Rs. 100 at the date of the agreement. The valuable property that might come into existence if the conditions of the agreement were carried out by both parties cannot be held to furnish the test of valuation for purposes of the Registration Act. We entirely endorse Mr. Justice Rivaz's remark at page 62 of the report of the case cited above that "it was not the intention of the Registration Act that a document not on the face of it compulsorily registrable should be held hereafter to have required registration because the right dealt with, though of quite uncertain value at the date of the deed, afterwards turned out to be of value considerably in excess of Rs. 100." Further, as observed by the same learned Judge in page 63 of the report, Section 17 of the Registration Act has to be strictly construed as taken in connection with Section 49, it imposes such serious disqualifications for non-observance of registration. Unless the document is clearly brought within the purview of the section it cannot be excluded from being treated as evidence. If there is doubt the benefit must be given to it. This contention was advanced in the first Court but was rightly abandoned. It must now be overruled.

Another objection is that the suit does not lie, as this is a claim for accounts of a partnership without suing for dissolution. The authorities in support of this position are beyond question, but the objection was never urged before and has no foundation in fact. The second issue drawn by the District Judge related to an objection of a wholly different kind which was never attempted to be supported. The claim was for accounts of a co-ownership in immovable property, not of a partnership, and it was never urged in the Courts below that this was a partnership. The misdescription of the claim in the judgment of the first Court appears to be the only foundation for the contention. The Divisional Judge never uses the expression. The distinction between co-ownership of property and a partnership is sometimes fine, but there is no such difficulty in defining the legal relations of the parties in this case. The defendant simply agreed to transfer a half share in his *kul* on condition of plaintiff paying half the expenses of excavating it afresh. The other conditions relate to enjoyment of the income and management. There never was any business properly so called transacted or meant to be transacted with reference to the *kul* and its income, and the parties did not become agents of each other like partners. Other incidents need not be discussed. There never was any doubt of either party being able to transfer his interest to others. The objection is wholly unfounded.

Another objection is that plaintiff not having contributed to the expenses of repairs cannot claim share of the produce for any of the years for which accounts are claimed. But the agreement only deprives a co-sharer of his share of the income in case he *refuses* to pay his *quota* of expenses of repair, &c. Non-payment is not refusal. The defendant was managing, and he is entitled to deduct the expenses. There was no plea that plaintiff refused to pay for the repairs of any particular year.

There is no other objection on respondent's part which requires separate notice.

The case will be remanded to the lower Court to decide the last three issues. Only the word partnership in issue 8 should be eliminated and the word co-ownership substituted. The remaining issues are to be understood as decided in plaintiff's favour except issue 5, as to which our finding is that there have been no accounts after 1936. Plaintiff does not claim anything before 1940 *Sambal*, but the defendant may be entitled to deductions on account of his expenses in the litigation relating to

the *kul*. The necessity for this litigation has been fully argued on both sides, and our opinion is that it is established so far as the right of irrigation from the *kul* is concerned which was understood to be in jeopardy. We express no opinion as regards the defendant's books.

As regards the limitation applicable to the present suit for accounts there was not much argument. There never was any definite refusal to render an account on the part of the defendant, and we have found that he did offer to render it about 1885. There is no express provision applicable to a suit of this kind. It is to some extent analogous to *Muhammad Habibulla Khan v. Safdar Hussain Khan*, I. L. R., VII All., 25, in which Article 120 was applied to a suit for accounts against a co-sharer. This might be held to govern the present case also. But defendant would in equity be entitled to recoup himself from plaintiff's share if upon the accounts prior to six years anything is due to him, and the whole of the accounts from 1937 must therefore be gone into. But plaintiff will not be entitled to recover anything on account of his share of the income which accrued before the last six years.

We accept the appeal and reversing the decrees of the lower Courts, return the case to the Court of first instance for a fresh decision with reference to the above remarks. Court's fee on the petition for appeal will be refunded. Other costs to be costs in the cause.

Appeal allowed : cause remanded.

No. 52.

Before Mr. Justice Frizelle, Chief Judge, and Mr. Justice Clark.

ARJAN SINGH,—(PLAINTIFF),—APPELLANT,

Versus

SOCHET SINGH AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

} APPELLATE SIDE.

Case No. 1113 of 1897.

Punjab Land Revenue Act, 1887, Section 156 (2) (vii), (viii)—Suit to set aside award of arbitrators appointed by Revenue Officer in partition proceedings—Allegation of fraud, but no dispute as to title.

Plaintiffs sued to set aside an award of arbitrators appointed by a Revenue Officer, under Chapter X of the Punjab Land Revenue Act, 1887, in a dispute between the parties about partition of land. No question as to title was raised, but plaintiffs sued on the ground of fraud inasmuch as they had not been given the land which had been promised to them.

Held, that the suit would not lie, plaintiffs' only course being to press their objections before the Revenue Officer and thereafter appeal to the superior Revenue authority.

Further appeal from the order of J. A. Anderson, Esquire, Divisional Judge, Amritsar Division, dated 16th June 1897.

Birch, for appellant.

Muhammad Shaffi, for respondents.

The judgment of the Court was delivered by

27th July 1898.

FRIZELLE, C. J.—We are of opinion that the lower Courts are right in holding that plaintiff's suit did not lie. It was a suit to set aside an award of arbitrators appointed by a Revenue Officer under Chapter X of the Land Revenue Act in a dispute between the parties about partition of lands. Plaintiffs sue to have the award set aside on the ground of fraud, as the land has not been given to them which they were told they would receive. The question is one clearly arising out of proceedings for partition, and it is admitted that no question as to title is raised. It is also a question as to the allotment of land on partition of a holding, and we think the suit is barred by Section 158 (2) (xvii) and (xviii) of the Land Revenue Act. The effect of admitting the suit would be to subject the proceedings of Revenue Officers in cases of partition where there is no dispute as to title to the supervision of the Civil Courts, and this we think the above mentioned clauses of Section 158 of the Land Revenue Act expressly forbid. It makes no difference in our opinion that plaintiffs sue on the ground of fraud. No exception is made on account of fraud in the clauses referred to. Plaintiffs' only course was to press their objections before the Revenue Officer and thereafter appeal to the superior Revenue authority.

The appeal is dismissed with costs.

Appeal dismissed.

No. 53.

Before Mr. Justice Frizelle, Chief Judge, and Mr. Justice Reid.

SOHNA,—(DEFENDANT),—APPELLANT,

Versus

NAND RAM,—(PLAINTIFF),—AND OTHERS,—
(DEFENDANTS),—RESPONDENTS.

Case No. 285 of 1896.

Partnership—Lien—Contract Act, 1872, Sections 60, 61, 217, 262—Set-off—Civil Procedure Code, 1882, Section 111.

The rule as to the equitable lien possessed by each partner on the partnership property cannot be applied so as to enable a managing

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partner to appropriate money due to another partner out of the assets of a firm in liquidation of a debt due from that partner to himself and entirely unconnected with the business of the firm.

Neither at common law nor in equity is there any right of set-off between parties mutually indebted in the absence of an agreement to that effect. Nor do the provisions of Section 111 of the Civil Procedure Code apply where the debt sought to be set-off was barred by limitation before the suit was filed.

Further appeal from the order of C. P. Bird, Esquire, Divisional Judge, Hoshiarpur Division, dated 5th February 1896.

Jaishi Ram, for appellant.

Gouldsbury, for respondent.

The judgment of the Court was delivered by

REID, J.—The first and second pleas in appeal have no 10th Augt. 1898.
force.

The suit was not for dissolution of partnership, but for money alleged to be due to the plaintiff by the answering defendant for his share of the principal and profits, after the partnership had been dissolved. The third and fourth pleas are also without force. We see no reason to differ from the concurrent findings of the Courts below, that the conclusions as to profits arrived at by the Commissioner were correct. He excluded from profits the sums expended in purchase of drugs and payment of Government demands for the lease. The partnership capital was presumably raised to defray these initial expenses, and the appellant has failed to show that this was not the case.

The fifth ground was not argued, while the sixth traverses a finding of fact on which the Courts below have concurred, and on which we see no reason to differ from them.

The evidence on which the seventh ground of appeal is based was not believed by the Courts below, and we see no reason for believing it. The two witnesses relied on by the appellant told a most improbable story, and we concur in the reasons given by the lower Appellate Court for not accepting it. In support of the eighth ground it has been contended that the appellant having money of the respondent-plaintiff in his hands was entitled to appropriate it to the liquidation of a debt due by the plaintiff to him.

Reliance was placed on Sections 60 and 61 of the Contract Act, which are obviously inapplicable. There was no

payment by the plaintiff. Section 262 of the Contract Act, also relied on, is inapplicable. The rule therein contained is not that a partner may liquidate a private debt to himself by another partner out of the latter's share in the assets. That is not the nature of a partner's lien. In Lindley on *Partnership*, Ed. 9, the law is thus laid down: "In order to discharge himself from the liabilities to which a person may be subject as partner every partner has a right to have the property of the partner applied in payment of the debts and liabilities of the firm. And, in order to secure a proper division of the surplus assets, he has a right to have whatever may be due to the firm from his co-partners, as members thereof, deducted from what would otherwise be payable to them in respect of their shares in the partnership. In other words, each partner may be said to have an equitable lien on the partnership property for the purpose of having it applied in discharge of the debts of the firm, and to have a similar lien on the surplus assets for the purpose of having them applied in payment of what may be due to the partners respectively, after deducting what may be due from them, as partners, to the firm."

This rule obviously cannot be applied, as the pleader for the appellant asks us to apply it, so as to enable a managing partner to appropriate money, due to another partner out of the assets of the firm, in liquidation of a debt due from that partner to himself and entirely unconnected with the business of the firm.

The suggestion that the appellant as a partner was an agent of the plaintiff and as such had a lien under Section 217 of the Contract Act is met in *limine* by the fatal objection that the money alleged to be due was not alleged, much less proved, to be due in respect of the partnership business. Reliance was also placed on a right to set-off the debt alleged to be due against the claim.

We have already found that so far as the seventh ground of appeal concerns set-off the evidence relied on must be rejected, and the appellant has failed to prove any agreement to set-off the one claim against the other.

In Leake on *Contracts*, Ed. 3, it is laid down that by common law there is no right of set-off between parties mutually indebted in the absence of an agreement to that effect, and that the rule of equity is the same, except in special circumstances, which do not arise here.

None of the provisions of the Contract Law dealing with set-off or lien apply to this case, and the debt sought to be set-off was admittedly barred by limitation, if not liquidated before this suit was filed, so that the provisions of Section 111 of the Code of Civil Procedure do not apply. The last ground taken in appeal was not pressed.

The appeal fails and is dismissed with costs.

Appeal dismissed.

No. 54.

Before Mr. Justice Reid.

AMIN CHAND,—(OBJECTOR),—APPELLANT,
Versus
 PHAGU MAL,—(OPPOSITE PARTY),—RESPONDENT.

} APPELLATE SIDE.

Case No. 731 of 1898.

Guardians and Wards Act, 1890, Sections 3, 7—"Will or other instrument"—Nuncupative will—Appointment of minor's heir as guardian of property.

Held, that the provisions of Section 7 of the Guardians and Wards Act, 1890, do not apply to nuncupative wills.

Held, further, that inasmuch as a minor's heir is peculiarly interested in the good management of the property to which he hopes to succeed, there is no objection to the appointment of such a person as guardian of the minor's property as distinct from the minor's person.

First appeal from the order of Muhammad Sarfraz Khan, Additional District Judge, Lahore, dated 10th May 1898.

Sant Ram, for appellant.

Gobind Ram, for respondent.

The judgment of the Court was as follows :—

REID, J.—The construction placed by the Court below on 13th Aug. 1898. the third clause of Section 7 of the Guardians and Wards Act (VIII of 1890) is reasonable, and is supported by the history of the legislation on the subject.

The words in Act XL of 1858, corresponding to "will or other instrument" in the clause in question, are "will or deed," and it is significant that in Sections 5, 7 and 39 of the present Act the words "will or other instrument" appear, while throughout the old Act the words used were "will or deed." I am therefore of opinion that the intention of the legislature was to exclude nuncupative wills, and that Section 7 applies only to a documentary will.

In this view it is unnecessary to consider whether the evidence as to the nuncupative will set up is true or false, although I concur with the Court below in the opinion that the failure to mention the alleged will for more than two months after the appellant's objections were filed, although there had been two intermediate proceedings, is suspicious.

The objection based on No. 135, *Punjab Record*, 1893, that the respondent did not name any person as guardian, has no force, the application being for the appointment of the respondent or some other person, and this position was not abandoned, although the respondent would have preferred some one, other than himself, being appointed.

Reliance is placed, for the appellant, on the dictum in No. 137, *Punjab Record*, 1893, that it is obviously objectionable that a minor should be made the ward of his own heir, and it is contended that the word "ward" was used in this ruling, as defined in Section 3 of the Act, with reference to both person and property. I cannot allow this contention. There is no obvious danger to property when it is managed by the heir, whatever danger there may be to a child in the guardianship of the person who would profit by his death. The heir is peculiarly interested in the good management of the property to which he hopes to succeed.

The allegation that the respondent is personally unfit for the management of the minor's property has no force.

The appeal fails and is dismissed with costs.

Appeal dismissed.

No. 55.

Before Mr. Justice Chatterji and Mr. Justice Anderson.

MUNICIPAL COMMITTEE, UMBALLA,—(DEFENDANT),—
APPELLANT,

Versus

BHAGWAN DAS,—(PLAINTIFF),—RESPONDENT.

Case No. 1 of 1898.

Punjab Courts Act, 1884, Section 67—Hearing fixed for gazetted holiday—Obligation of party to appear on such day.

Proceedings held in a Civil Court on a holiday are not necessarily a nullity on that account, but if the Court wishes to hear a case on a gazetted civil holiday, it must do so with the consent of the parties concerned and cannot make them appear before itself without such consent, the exemption from attendance in Court on a gazetted holiday

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being a privilege conferred by law, of which no Court can of its own motion deprive the person concerned in the absence of any waiver of such privilege on the part of the latter. Nor in this respect is there any distinction between one class of gazetted holidays and another class.

*Case referred by W. A. Harris, Esquire, Divisional Judge,
Umballa Division, by order, dated 23rd June 1898.*

The judgment of the Court was as follows—

CHATTERJI, J.—The material facts are briefly these: The 10th Augt. 1898. hearing of the appeal, *Bhagwan Das v. The Municipal Committee of Umtalla*, in the Divisional Judge's Court was fixed for the 22nd June 1898, but by order of the Judge, Mr. W. A. Harris, the date was accelerated to the 19th May which was one of the gazetted holidays for the Civil Courts for *Muharram*. The respondent in acknowledging service pointed out that his pleader might not attend on this account and asked for a fresh date. This prayer was not acceded to, with the result that there was no appearance for the respondent on the 19th, and the appeal was decided against him *ex-parte*.

The respondent then applied for a rehearing on the ground that he was not bound to attend on a gazetted holiday. The Divisional Judge has referred the case to us under Section 617, Civil Procedure Code, for our opinion whether attendance was obligatory on such a day in consequence of his order, or whether the Court was powerless to proceed and bound to adjourn the hearing. He thinks there are some holidays on which Christians might well object to attend such as Sunday, Christmas Day and Good Friday, others on which attendance would be equally obnoxious to Hindus or Muhammadans, but that if the hearing is fixed for any other civil holiday besides these, the suitors would be bound to attend.

We are of opinion that it is an irregularity to hold Court on a day which is a gazetted holiday without the consent of parties, and that attendance on such a day is not obligatory at least when such consent has not been previously given. This has been ruled in numerous instances, *Punjab Record*, No. 86 of 1890, quoted by the Divisional Judge; Civil Appeal No. 1384 of 1889 (unpublished); *Ram Das Chakrabati v. The Official Liquidator of the Cotton Ginning Company, Limited, Cawnpore*, I. L. R., IX All., 366; *Queen v. Hargobind Datta, Sirkar, &c.*, VIII B. L. R., App. 12; see also as to an analogous point *Haro Jemdar and others J. Ds. v. Jadul Chunder Holdar*, D. H. III W. R., Misc. 24. Section I, para. 2 of the 2nd Volume of the Rules and Orders issued by this Court shows by what authority

the civil holidays are prescribed. The list of these holidays is framed by this Court with the sanction of the Local Government under Section 67 of the Punjab Courts Act. That section is practically worded in the same way as Section 17 of the old Bengal Civil Courts Act, VI of 1871, the only difference being that the word "close" is not found in the Punjab Act, which is unimportant for purposes of the present discussion (see also Section 15 of present Bengal and N.-W. P. Courts Act, XII of 1887). The learned Chief Justice observed in the Allahabad case cited above that the section in the earlier Bengal Act was enacted in the interests of Judges and officials of the Courts as well as in those of the pleaders, suitors and witnesses whose religious observances might interfere with their attendance in Court on particular days. The same observations apply to Section 67 of the Punjab Courts Act. The duty of framing the list is obligatory by statute on the superior Court, and the intention of Legislature clearly is that the holidays on the list should be observed by the Courts subordinate to such Court. The imposition of the duty would be unmeaning if this is not meant, and if the subordinate Courts can of their own will compel suitors to attend before them on holidays entered on the list. For special reasons they may hold Court on such days, but the suitors can only be made to attend if they consent—and not otherwise.

The distinction suggested by the Divisional Judge does not appear to be supported by any authority, nor has the Judge quoted any. In England a distinction is made between a Sunday and an ordinary holiday, the former being a *dies non-juridicus*, but this has its foundation in the law of the country, while it is doubtful whether it obtains in India at least in the *motassil*. In England an arrest under a civil process is void on a Sunday (Daniell's *Chancery Practice*, 6th Edition, page 886), but Section 336, Civil Procedure Code, makes no such exception, see also *Ummito Ram Chatterji v. Protap Chunder Shiromonee*, XVI, W. R., 230). This is, however, by the way and it is not necessary to decide the point. What we mean to point out is that the law does not seem to recognize any distinction between one class of holiday and another. All appear to be put on the same footing. The assumption by a subordinate Court of the power of deciding what holidays are obligatory on the conscience of people of a particular religious denomination has no sanction in law and might lead to mischievous results. Moreover if the power were conceded the Court might, if so disposed, by

adopting the process of discrimination pointed out by Divisional Judge hold Court on almost every sanctioned holiday and thereby cause great inconvenience to its Officials, to the suitors and to legal practitioners. All this is meant to be avoided by the list being prepared by a central authority after careful consideration.

Proceeding held in a Civil Court on a holiday are not necessarily a nullity on that account, but if the Court wishes to hear a case on a gazetted civil holiday, it must do so with the consent of the parties concerned; and cannot make them appear before itself without such consent. Once the consent is given the Court's proceedings become legal and cannot be impeached. Nor can they be impeached except by the parties and only on the above grounds. But the exemption from attendance in Court on a gazetted holiday is a privilege conferred by law, and unless it has been waived by the person concerned, no Court can of its own motion deprive him of it.

In this case it is admitted that the respondent's consent to attend on 19th May 1898 was not obtained when the date was fixed, and that on notice being served on him he objected and asked for a fresh date. Under the circumstances the act of the Divisional Judge was clearly illegal, and the respondent cannot be punished for his default. We hold, therefore, that the *ex-parte* order must be set aside and the appeal heard afresh by the Divisional Judge, and we direct the Judge to act accordingly.

No costs were incurred in this Court, as neither party entered appearance.

No. 56.

Before Mr. Justice Reid and Mr. Justice Clark.

SANT RAM AND ANOTHER,—(DEFENDANTS),—
APPELLANTS,

Versus

MUSSAMMAT MOHAN DEVI,—(PLAINTIFF),—
RESPONDENT.

} APPELLATE SIDE.

Case No. 359 of 1897.

Order of remand under Section 562, Civil Procedure Code, 1882—Erroneous order—Powers and duties of Chief Court when hearing appeal from such order.

Held, that when a certain fact is the basis of a suit and there is no suggestion that the inquiry into that fact by the first Court has been insufficient or imperfect, and the lower Appellate Court, differing from the

Court of first instance as to the existence of that fact, has remanded the suit under Section 562 of the Code of Civil Procedure, the Chief Court, when hearing an appeal from the order of remand, is entitled, when it finds that the order of remand should not have been made under that section, to itself consider and decide upon the truth of such fact, and is not bound to return the appeal to the lower Appellate Court for decision thereon.

Miscellaneous appeal from the order of Sardar Muhammad Hayat Khan, C.S.I., Divisional Judge, Amritsar Division, dated 8th February 1897.

Madan Gopal and K. P. Roy, for appellants.

Jaishi Ram, for respondents.

The facts of the case are sufficiently stated in the judgment of the Court delivered by

9th May 1898.

REID, J.—In addition to the grounds of appeal already filed counsel for the appellants is allowed to urge the following, filed in a memorandum of appeal on behalf of one of the appellants, which is barred by limitation:—

- (1) It is proved that defendant No. 2 has ceased to be a partner, so plaintiff cannot sue him.
- (2) The plaintiff as defendant has admitted the same in her written statement of the 18th January 1895, in *re* Sarab Dial v. Sant Ram and Mussammat Mohan Devi, defendants.

The facts have been stated at great length in the judgments of the Courts below and need not be recapitulated.

The Court of first instance found that the respondent was a partner of the firm, of which her late husband was a partner, after his death, until at any rate the insolvency of the firm a short time before suit. Amar Das, respondent's husband, admittedly died more than three years before suit.

The lower Appellate Court found that the respondent was never a partner, and that her suit for an account of the profits of the partnership dissolved by the death of her husband was barred by limitation under Article 106 of Schedule II, Act XV of 1877, but that her suit might be converted into a suit for her share of sums realized by the firm from debtors within three years of suit.

The suit was then remanded to the Court of first instance, under Section 562 of the Code of Civil Procedure, for inquiry into the amount of the share of such sums due to the respondent.

The pleader for the respondent contends that if this Court decides that the remand should not have been made under Section 562, it must return the appeal to the lower Appellate Court, and cannot decide whether, as a fact, the respondent was or was not a partner.

It is further contended that the Court of first instance decided the suit on two grounds : (1) that the suit as filed was barred by limitation ; (2) that the respondent, being a partner, could not sue for sums received by the firm since the death of her husband, and it is contended that the second is not a preliminary point.

Reliance is placed on No. 46, *Punjab Record*, 1885, and an unreported ruling of this Court in miscellaneous appeal No. 318 of 1895. In those cases it was held that the lower Appellate Court had wrongly remanded the suit under Section 562, the point not being preliminary, and that he should dispose of all the issues before him, and if necessary remand under Section 536. In the case before us it is admitted that the suit must fail if the Court of first instance was right in holding that the respondent was a partner after the death of her husband, and no other issue can arise. The only result of adopting the course suggested by the pleader for the respondent would be that after considerable time and trouble had been expended on taking accounts the appellants would appeal to this Court again, on the ground now taken, that the respondent was, as a fact, their partner. We are unable to appreciate the expediency of adopting a course so obviously calculated to waste time. There is no case here of a remand under Section 566, and it has not been suggested that the inquiry into the existence of the partnership was imperfect.

In *Sayad Mazhar Hussain v. Mussammat Bodha Bibi*, *I. L. R.*, *XVII All. (P. C.)*, 112, their Lordships of the Privy Council held that in a suit based on a will which had been dismissed by the first Court on the ground that the will was not proved, the Appellate Court, which held that the will was proved, should have proceeded under Section 565 and decided the issues ancillary to that which concerned the genuineness of the will on the evidence on the record. The report of the case is simply to the effect that their Lordships granted special leave to appeal and up to the last number of the *I. L. R.*, *All.*, no further report has appeared. Their Lordships held that the order under Section 562 was final so far as to allow an appeal to their Board.

The question raised before us does not appear to have been raised in the cases before this Court above referred to. No. 6, *Punjab Record*, 1892; *Abraham Khan v. Faiz-un-nissa*, I. L. R., XVII Calc., 168; *Raisiuggi v. Balvantrao*, I. L. R., XI Bom., 663; and *Amma v. Kunhanni*, I. L. R., IX Mad., 355, are also relied on for the respondent. Of these the *Punjab Record* case and the Calcutta case are alone in point. The former is based on *Sohan Lal v. Aziz-un-nissa Begam*, I. L. R., VII All., 136, in which Mahmud, J., says: "It is to be observed that the case from which this appeal has arisen is one which can come up before us only in second appeal, and we are of opinion that the circumstance that this appeal is a first appeal from order under the provisions of clause (28), Section 588 of the Code would not alter the nature of the powers to be exercised by us in second appeals under Section 584." This clearly distinguishes the powers of the Allahabad, and also of the Calcutta Court, from the powers of this Court, which can decide a further appeal on the facts and is not bound by the finding of fact of the lower Appellate Court, as the other High Courts are under the Code of Civil Procedure. Rivaz, J., who decided No. 6, *Punjab Record*, 1892, was sitting alone, and his pecuniary jurisdiction in appeals from decrees passed in suits was limited to Rs. 100. From the record it appears that the value of the subject-matter of the appeal before him was Rs. 2,500. Our pecuniary jurisdiction is unlimited and, in our opinion, we can, and should, decide the question whether or not the respondent was, as a fact, a partner in the firm after the death of her husband. The reason for the attitude adopted by her is obvious. On the death of her husband the firm was prosperous and possessed considerable assets. It has since become insolvent. As representing her husband she would be entitled, according to previous statements by her, or on her behalf, to Rs. 50,000 or Rs. 60,000; as a partner she would be entitled to nothing, or, at any rate, to very little, and that little could not be recovered in this suit. For the reasons given by the Court of first instance we have no hesitation in holding that she succeeded her husband as a partner in the firm. She is not a *pardha nashin* lady, in the sense in which Muhammadan and some other ladies are *pardah nashin*. It is a matter of every day experience that Khatri ladies take a considerable share in the management of business conducted by their families, and we see no reason for doubting that she went to the registration office and transacted the other business which the witnesses for the appellants depose that she transacted, or for dis-

believing the evidence of Ghulam Mohi-ud-din and of Radha Ram and Jagan Nath. They were not shaken in cross-examination, and no adequate motive for their giving false evidence is suggested.

The course adopted by the Court of first instance, on having reason to suspect that the respondent was a partner in the firm, was justified, and there can be little doubt that the opinion formed by that Court as to the objects and motives of the parties to this suit is well founded.

We decree the appeal and restore the decree of the Court of first instance, but, having regard to the conduct of the appellants, we leave the parties to pay their own costs of this and of the lower appellate Court.

Appeal allowed.

No. 57.

Before Mr. Justice Chatterji and Mr. Justice Clark.

**BUDE SINGH AND OTHERS,—(PLAINTIFFS),—
APPELLANTS,**

Versus

**MUSSAMMAT DHAN KAUR AND ANOTHER,—
(DEFENDANTS),—RESPONDENTS.**

} APPELLATE SIDE.

Case No. 2 of 1896.

Custom—Alienation—Suit by remote reversioner in presence of nearer reversioner—Speculative suit.—

The rule that where a nearer reversioner is precluded from suing to contest an alienation, or colludes with the alienor, a more remote reversioner can sue, has no application to a purely speculative claim with only the remotest chance of ever having any practical effect.

In the present case the plaintiffs, according to the genealogical table, had only a very remote chance of succeeding to a small portion of the estate in dispute.

Held, that plaintiffs were not entitled to sue for a declaration that an alienation should not affect their reversionary rights.

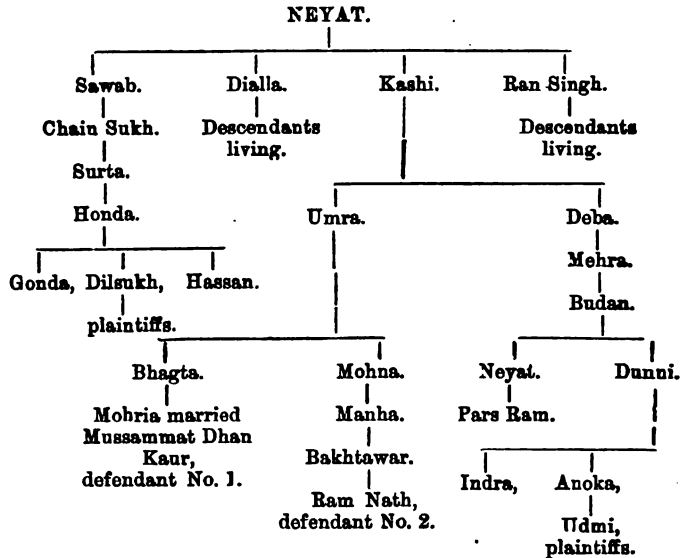
No. 7, *Punjab Record*, 1893, and No. 81, *Punjab Record*, 1896, followed. Further appeal from the order of J. A. Anderson, Esquire, Divisional Judge, Delhi Division, dated 7th October 1895.

A. L. Roy, for appellants.

Duni Chand, for respondents.

The facts of the case and the relationship of the parties sufficiently appear from the judgment of the Court delivered by

18th June 1898. CLARK, J.—The genealogical tree as far as it is material, is as follows :—



Plaintiffs sued for a decree declaring that an alienation by mutation on 5th May 1893 by Mussammat Dhan Kaur in favour of Ram Nath should not affect their reversionary rights. The real question was whether Mohria had adopted Ram Nath, and the prior question arises whether plaintiffs are entitled to sue.

A reference to the genealogical tree shows that plaintiffs have only the very remotest chance of succeeding to a small portion of Mohria's estate.

Mussammat Dhan Kaur is now dead, and if Ram Nath was not adopted then Bakhtawar is his heir, and Ram Nath is Bakhtawar's heir. Even if they died out, the descendants of Deba would all exclude plaintiff.

It has been held that where a nearer reversioner is precluded from suing, or colludes with the alienor, a more remote reversioner can sue, but this is not the case here. This is a purely speculative claim, with only the remotest chance of ever having any practical effect. We think that plaintiff is not entitled to sue, following *Punjab Record*, No. 81 of 1896, and No. 7 of 1893. It was argued that Mohria was Bhagta's *pichlag*, and that the estate was not inherited from Bhagta, but given to him by all the collaterals, and that Mohria's line having come to an end, the estate reverted to the donors.

This is an entirely new case and we refuse to listen to it at this stage.

The appeal is dismissed with costs.

Appeal dismissed.

No. 58.

Before Mr. Justice Chatterji and Mr. Justice Anderson.

JAISUKH,—(DEFENDANT),—APPELLANT,

Versus

DINA NATH,—(PLAINTIFF),—RESPONDENT.

} APPELLATE SIDE.

Case No. 90 of 1898.

Civil Procedure Code, 1882, Sections 130, 136, 138, 139—Failure to comply with order directing defendant to produce documents by specified date—Defence struck out and case heard ex-parte.

Plaintiff's plaint was filed in the District Court on the 23rd December 1895, and the 9th February 1896 was fixed for defendant's appearance. The latter appeared on the said date, but the case was put off to the 24th February on which date defendant filed his defence. After several adjournments, issues were drawn and the parties examined on the 2nd April, and at the close of the day's proceedings the District Judge recorded an order to the following effect: "Case for evidence on the 19th and 20th May. Defendant must file the documents he has in his possession and copy of his account-book by 5th April." On all the adjourned dates, except one, defendant was present in person in Court.

On the 2nd April plaintiff had a notice served on defendant for the production of his books and certain letters, and on the 9th April defendant gave plaintiff notice under Section 132 of the Civil Procedure Code, offering inspection at a certain place on the 19th. On the 21st April, after inspection by the plaintiff, defendant applied for leave to remove his books to his shop, and on the following day the District Judge gave the required permission. Plaintiff called defendant as his witness for the 19th May, but the notice was returned unserved with the endorsement that defendant had gone away. Therefore plaintiff's pleader complained that defendant had kept out of the way to evade service, and had not complied with the order of the 2nd April. The Court was, therefore, asked to proceed under Section 136 of the Code, by striking out defendant's defence, and to decide the case *ex-parte*. The Court held that the said order was one under Section 130 of the Code, struck out the defence under Section 136, and after taking some evidence for the plaintiff, decreed the claim in full. The decree having been upheld by the Divisional Court on appeal, defendant appealed to the Chief Court.

Held, that the lower Courts had erred in treating the order of the 2nd April as one passed under Section 130 of the Code, and that the District Court was not justified by defendant's non-compliance with the said order in striking out the defence and deciding the case *ex-parte*.

Section 130 of the Code does not apply to a general direction, without any particular object in view, to a party to produce all documents in his possession by a certain date, and (*semble*) the order therein referred to is meant to be served on the party to whom it is given, and not merely to be verbally announced, so that compliance would depend on his memory or his understanding of it.

Held, further, that even if the order in question had been one under Section 130, it could not be legally given in respect of the copy of defendant's accounts as they were not in existence, and therefore not in the possession or power of defendant, when it was passed.

Section 136 of the Code requires to be worked with caution and should be made use of only as a last resort, and it is always proper to make the order a conditional one and to grant a little further time for compliance.

Further appeal from the order of F. A. Robertson, Esquire, Divisional Judge, Umballa Division, dated 12th November 1897.

Madan Gopal, for appellant.

J. C. Bose, for respondent.

The judgment of the Court was delivered by

12th July 1898.

CHATTERJI, J.—The material facts of this case are these : The plaintiff's plaint was filed in the Umballa Court on 23rd December 1895 and the 9th February 1896 was fixed for the defendant's appearance. He appeared and the case was put off to the 24th on which date he filed his defence. After several more adjournments the issues were drawn and the parties examined in detail as ordered by this Court on the 2nd April, and at the close of the day's proceedings the District Judge, Mr. G. Lewis, recorded an order to this effect : " Case " for evidence for the 19th and 20th May. Defendant must " file the documents he has in his possession and copy of his " account-book by 5th April." On all the adjourned dates except one the defendant was present in person in Court.

On 2nd April plaintiff had a notice served on defendant for the production of his books and certain letters. On 9th April defendant gave plaintiff notice under Section 132, Civil Procedure Code, offering inspection at the *arzinavis'* quarters near the Court-house on the 19th. On 21st April apparently after some kind of inspection by the plaintiff defendant applied for leave to take away his books to his shop which the District Judge permitted on the following day.

Plaintiff called defendant as his witness for the 19th May, but the notice was returned unserved with the endorsement that the defendant had gone to Saharanpur. On the day of hearing plaintiff's pleader Lala Dwarka Das complained

to the Court that defendant had kept out of the way in order to avoid service and brought to the Court's notice that he had not complied with the order to produce documents passed on the 2nd April. He asked the Court to proceed against defendant under Section 136, Civil Procedure Code, by striking out his defence and to decide the suit *ex-parte*. Gopal Das, pleader for the defendant, pointed out that the Court's order of the 2nd April was not one under Section 130, Civil Procedure Code, but intended merely to facilitate the proceedings in the case. The Court, however, ruled that it was one falling under Section 130 and struck out the defence under Section 136 and proceeded to hear the case *ex-parte*. After taking some evidence for the plaintiff it decreed the claim in full. This decree was upheld on appeal by the Divisional Judge.

In further appeal the defendant contends that the procedure of the lower Courts was erroneous in law, unwarranted by the facts of the case and harsh and oppressive. After hearing counsel on both sides, we are of opinion that these grounds have been substantially made out.

We are disposed to think that the order of Mr. Lewis was not an order falling within the provisions of Section 130, Civil Procedure Code. That section contemplates the production of documents relating to any matter in question in the suit before the Court, and only such of them as the Court considers proper and it leaves the Court full discretion to deal with such documents when produced in such manner as appears just. This would seem to imply that the Court of itself, or at the instance of a party to the suit, has directed its attention to a particular matter and to the documents bearing on such matter at the time the order is passed, and that it has consciously determined before giving the order what documents of the nature above described should be produced. The section does not seem to apply to a general direction, without any particular object in view, to a party to produce all documents in his possession by a certain date. Under Section 138 the parties to a suit are bound to have in readiness at the first hearing of the suit, to be produced when called for by the Court, all the documentary evidence in their possession or power on which they intend to rely, or the production of which has already been ordered by the Court. The penalty for non-compliance with the section is provided in Section 139, and is merely the exclusion of all documents not so produced from being received in evidence without the special leave of the

Court on good cause for non-production being shown. It is not that the defence is to be struck out, or the case decided *ex-parte*. We consider Mr. Lewis simply intended to call for the documents and gave defendant time to produce them by the 5th April as they were evidently not ready on the 2nd when the issues were drawn. It is also probable that the order spoken of in Section 130 is one meant to be served on the party to whom it is given and not merely to be verbally announced, so that compliance would depend on his memory or his understanding of it, *Doorgamonee Dossee v. Benode Monee Dossee*, *W. R.*, 1864, page 164. At any rate there can be no doubt of the propriety of serving such an order in writing. Lastly as pointed out in No. 59, *Punjab Record*, 1892, the order could not be legally given in respect of the copy of defendant's accounts as they were not in existence and therefore not in the possession or power of the defendant when it was passed. We therefore think the first Court was wrong in treating Mr. Lewis's order as one passed under Section 130, and we have little doubt that Mr. Lewis never meant it to be so.

Further even if the order was one under Section 130 the procedure of the Court appears to have been most hasty and harsh, and not at all called for by the circumstances of the case. We can find no substantial foundation for the plaintiff's pleader's complaint that the defendant had intentionally avoided service of summons as a witness. He had repeatedly appeared in person before, and this ought to have been borne in mind. Again he had produced his books in original for the inspection of the plaintiff in pursuance of a notice under Section 131, Civil Procedure Code, given by the latter and had kept them in Court for three days. He had taken them back with the Court's knowledge and permission. No reference was made to this fact by the plaintiff or the Court when the order under Section 136 was passed.

Section 136 requires to be worked with caution and should be made use of only as a last resort. The practice of the English Courts is, and it is always proper, to make the order a conditional one and to grant a little further time for compliance. *Twycroft v. Grant*, *W. N.* 75, page 229; *Daniell's Ohancery Practice*, 6th Edition, page 1851; *Khajah Assenoolla v. Khajah Abdool Aziz*, *I. L. R.*, IX *Calc.*, 923. In this instance the section has been applied absolutely without any justification even if the application was legal which it was not.

We accept the appeal, and, setting aside the decrees of the Courts below, remand the case to the Court of first instance to be heard and decided in accordance with law after taking all evidence produced by the parties. The respondent will pay all costs up to date.

Appeal allowed.

No. 59.

Before Mr. Justice Reid.

DAULAT RAM,—(DEFENDANT),—PETITIONER,

Versus

RUP LAL,—(PLAINTIFF),—RESPONDENT.

} REVISION SIDE.

Case No. 680 of 1898.

Civil Procedure Code, 1892, Sections 336, 337 A—Arrest and imprisonment in execution of decree—Subsequent application stating judgment-debtor's intention to apply to be declared an insolvent—Rejection of application—Illegal confinement—Duress.

Where a debtor, on being arrested and brought before a Court in execution of a decree, expresses his intention to apply to be declared an insolvent, under Section 336 of the Civil Procedure Code, the Court must release him on his furnishing security to appear when called upon and to apply within one month under Section 344 of the Code.

Where, however, the debtor did not apply under Section 336 on being first brought before the Court, but made such application after proceedings under Section 337 A had terminated, and it did not appear that he had furnished the requisite security,

Held, that, without holding that an application under Section 336 cannot under any circumstances be made after proceedings under Section 337 A, the Court in the present case was not bound to release the petitioner, and that his confinement in jail was not illegal by reason of such application.

Held, therefore, that a mortgage and bond executed by such debtor while in jail, for the purpose of securing his release were not void on the ground of duress.

Petition for revision of the order of R. L. Harris, Esquire, Divisional Judge, Derajat Division, dated 9th February 1898.

Ganpat Bai, for petitioner.

Krishen Singh, for respondent.

The facts of the case appear from the judgment delivered by

REID, J.—A decree for Rs. 700 was passed by a Munsif 4th Augt. 1898. against the petitioner and his father on a joint promissory note. On the 20th March 1891, the decree-holder applied for

the arrest of the petitioner, in execution, and a warrant returnable on the 4th July was issued.

On the 1st July the petitioner applied to the Subordinate Judge, with powers of a District Judge, to be admitted to bail, the warrant containing a condition that no bail was to be taken.

The Subordinate Judge transferred the proceedings to his Court and passed an order for the release of the petitioner on his own recognisances.

On the 4th July the Court found that the petitioner had concealed property to defeat execution, and committed him to jail under Section 337 A 2 (b) of the Code of Civil Procedure. On the same day the petitioner filed a petition stating his intention to apply to be declared an insolvent. This petition was apparently under Section 336 of the Code. The Court passed an order thereon declining to release the petitioner, on the ground that the previous order under Section 337 was not affected by the application.

On the 22nd July the petitioner executed the mortgage in suit for Rs. 300 and a bond for Rs. 400 and was released from jail.

On the 25th August he applied to be declared an insolvent.

The first question is whether the petitioner was in illegal confinement on the 22nd July.

Where a debtor, on being arrested and brought before a Court, expresses his intention to apply to be declared an insolvent, under Section 336, the Court must release him on his furnishing security to appear when called upon and to apply within one month under Section 344, but it does not appear that the petitioner furnished such security, while he certainly did not apply under Section 336 on being first brought before the Court. On the contrary, he did not apply until proceedings under Section 337 had terminated. Without holding that an application under Section 336 cannot under any circumstances be made after proceedings under Section 337, I do not think that the Court was bound to release the petitioner and that his confinement in jail was illegal, under the circumstances above stated. Counsel for the petitioner relies on a passage in the judgment of their Lordships of the Privy Council in *Moung Shoay Att v. Ko Byaw, I. L. R., 1 Cal.*, 330, to the effect that, although lawful

imprisonment for a civil debt is not coercion, imprisonment in a country, where there is no settled system of law or procedure, and where the Judge is invested with arbitrary powers, is duress of a wholly different kind, as the prisoner neither knows what will be the length of his punishment, nor what amount of pain or misery he may be put to. This reasoning may have applied to Burmah in 1874, but certainly could not apply to this Province in 1891. The other authorities cited, *Marriot v. Hampton*, 2 Smith's *Leading Cases*, Edition V, page 356, and *Banda Ali v. Banspat Singh*, I. L. R., IV All., 352, are not in point. In the former it was held that money afterwards discovered not to have been due, paid under compulsion of legal process, could not be recovered in an action for money had and received, and in the latter it was held that a bond for a sum decreed by a Court without jurisdiction was voidable, as executed under duress.

Here there is no suggestion that the Court which passed the decree did so without jurisdiction.

The application fails, and is dismissed with costs.

Application dismissed.

No. 60.

Before Mr. Justice Chatterji and Mr. Justice Anderson.

FATEH ALI SHAH AND ANOTHER,—(DEFENDANTS),—
APPELLANTS,

Versus

MIRAN BAKHSH,—(PLAINTIFF),—RESPONDENT.

Case No. 959 of 1897.

} APPELLATE SIDE.

Promissory note—Consideration—Inequitable bargain—Burden of proof.

In a suit by plaintiff to recover from defendant No. I and his wife a sum of Rs. 10,000 principal and Rs. 2,400 interest on a promissory note purporting to be executed by both defendants on the 29th November 1895, payable six months after date, defendant No. I while admitting execution, pleaded that after he had attained majority his extravagance had necessitated his estate being again put under the Court of Wards; that after the time the debt was contracted he was living on a small monthly allowance of Rs. 160, which was inadequate for his wants; that he cast about for a loan, and that plaintiff, whom he described as an astute lawyer's clerk, caught him in his meshes and got him to execute the note for a grossly inadequate consideration. It was, therefore, urged on his behalf that the doctrine of the English Court of Chancery in the case of expectant heirs and necessitous persons should be applied, and a decree passed merely for what he had actually received, with reasonable interest

thereon. It appeared that defendant No. I was a well grown and mature man of about thirty, who had already succeeded to a large estate, and that, though addicted to extravagance and debauchery, he was not a person of weak mental capacity, or in any state of mental or bodily distress, or such necessity as made him incapable of weighing the consequences of the transaction into which he was entering with the plaintiff with whom he had had no previous dealings.

Held, that under the above circumstances defendant No. I could not be placed in the category of those incapable of protecting themselves, and that the case must, therefore, be treated as an ordinary case of debtor and creditor, the *onus* of proof of all the disputed facts being, on the pleadings, upon defendant No. I.

Held, further, that there is an equity founded upon the gross inadequacy of consideration, but it can only be when the inadequacy is such as to involve the conclusion that the party either did not understand what he was about or was the victim of some imposition.

Found, upon the evidence, that defendant No. I has failed to prove his allegations.

A plea by defendant No. II that she had never executed the promissory note or put her mark on it, or received consideration in respect thereof, *found*, not established.

First appeal from the order of Pandit Hari Kishen Kaul, District Judge, Lahore, dated 12th July 1897.

Madan Gopal, for appellants.

Browne, for respondent.

The judgment of the Court was delivered by

3rd July 1898.

CHATTERJI, J.—This is a suit by the plaintiff, a native of Lahore, to recover from the defendant, Fateh Ali Shah, a *raiz* of Multan, and his wife, Mussammat Lalan Bibi, the sum of Rs. 10,000 principal and Rs. 2,400 interest, on a promissory note purporting to be executed by both on 29th November 1895, payable six months after date. Before the execution of this note the first defendant wrote another payable on demand in plaintiff's favour on 28th October 1895 for Rs. 6,000, the consideration for which is alleged to have been jewels, specified in a receipt, page iv, worth Rs. 5,000, and a cheque on the Punjab Banking Company for Rs. 1,000. This note with Rs. 3,000 worth of jewellery, as per detail in receipt, page viii, and another cheque for Rs. 1,000 on the same Bank is said to form the consideration for the note sued on.

The first defendant admits the execution of the promissory note of 29th November, as well as the previous one of 28th October, and the receipts above mentioned, and the letters and other documents produced by the plaintiff in

support of his claim, but alleges that on the first occasion he received jewels worth Rs. 1,000 only instead of Rs. 5,000, and on the second occasion jewels worth Rs. 500 in place of Rs. 3,000. He admitted receipt of the two cash items of Rs. 1,000 each, thus making up the total consideration to be Rs. 3,500. The second defendant denied having executed the promissory note sued on or put her mark on any of the other documents filed by the plaintiff purporting to bear it. The first defendant stated that he had put on the marks for his wife at the plaintiff's request.

The issues were—(1) did defendant No. II Mussamat Lalan Bibi execute the note for consideration received? (2) Whether defendant No. I received full consideration?

The first Court found both issues in plaintiff's favour and decreed the suit. The defendants appeal.

The argument of appellants was that defendant No. I was a man of wealth, who on attaining majority had contracted large debts which had necessitated his estate being again put under the Court of Wards, that at the time the present note was executed he was living on a small monthly allowance of Rs. 160, which was inadequate for his wants, that he cast about for a loan from somewhere, and the plaintiff, an astute *ex-lawyer's* clerk, caught him in his meshes and got him to execute the note for a grossly inadequate consideration. Counsel urged that defendant from his habits was reckless and improvident, and agreed to whatever was proposed in order to meet his present wants, that the doctrines of the English Court of Chancery in the case of expectant heirs and necessitous persons should be applied to give his client relief, and that the contract should be narrowly scrutinized and a decree passed for what was actually received, with reasonable interest thereon. He denied that Mussamat Lalan Bibi's execution of the note was proved. Finally, he contended that the evidence fully established his client's allegation that only Rs. 3,500 were received in jewellery and cash.

The points for determination in this appeal appear to be—

- (1) whether the female defendant executed the note sued on; and
- (2) what consideration was paid for the note?
- (3) whether, if the full consideration stated in the note was not paid, that which was actually paid was so grossly inadequate as to justify the setting aside

of the contract as an unconscionable bargain and, if so, what relief should be granted to the plaintiff ?

Except in regard to the female defendant, who denies execution, which must therefore be proved by the plaintiff, the *onus* of proof of all contested matters appears, on the pleadings, to rest on the defence. The promissory note imports consideration, and if strict proof is not given of the facts alleged by the defendant, Fateh Ali Shah, plaintiff must get a full decree.

Cases in which relief is given by Courts of Equity to debtors by setting aside their contract may be roughly divided into two classes, (1) cases in which, in consideration of the relations between the parties to the contract, or physical or moral conditions which place the creditor in a position of undue superiority over the debtor, the former is required to satisfy the Court that he has acted with perfect good faith and fairness, the contract being at the outset looked upon with suspicion; (2) those in which without proof of the above circumstances the contract is shown by the evidence to be so extortionate and so hard on the debtor as to shock the conscience, and to throw doubt on the free consent of the debtor to the terms. In the former the *onus* of proving the validity of the contract is thrown on the creditor from the beginning. In the latter, the equitable jurisdiction of the Court comes into play only after the debtor has established his allegations unless upon the admissions in the pleadings he is discharged from this burden.

In our opinion the present case does not come under the former category. The defendant, Fateh Ali Shah, was not in the position of a young heir expectant or reversioner. He was a well grown and mature man of about thirty, who had already succeeded to a large estate. His mental capacity is not shown to be weak. He had on attaining majority wasted large sums in extravagance and debauchery, and contracted heavy debts which necessitated his estate being again placed in charge of the Court of Wards. This had its use in teaching him a lesson on the consequences of such a life as he had led and should have warned him against the dangers of reckless borrowing. He was literate and well able to understand business. He was not in any state of mental or bodily distress, or such necessity as made him incapable of weighing the consequences of the transaction he was entering into with the plaintiff. The latter had no previous dealings with him, and

had been introduced to him only a few days before. The exact circumstances under which the parties came together are explained by the plaintiff, and defendant has not alleged or proved anything to the contrary. As regards the plaintiff nothing particularly damaging was proved against him. He had been for a considerable time a lawyer's clerk, but though he went into the witness box and gave a full account of the transaction, nothing particularly damaging to his credit was brought out by the cross-examination. He may be a sharp and clever man of business, well able and ready to push his interests at the expense of others, but he has latterly held fairly respectable positions in life. There is nothing to show that he held a position of undue advantage with reference to the defendant Fateh Ali Shah. The latter was not in any necessitous condition such as made him incapable of protecting his own interests. He did not owe any money to plaintiff before, nor is it shown that there were debts due to others which he was pressed to discharge, and which compelled him to agree to plaintiff's hard conditions. His case is different from that of the merchant or tradesman in difficulties who, in order to save his credit, borrows money on ruinous terms, or of a person already deeply involved, who agrees to anything that his creditor proposes to avoid exposure, or to stave off his present difficulties. All that is alleged is that his estate being in the hands of the Court and his monthly allowance small he was anxious for a loan in order to gratify his taste for luxurious living. This fact alone does not place him in the category of those incapable of protecting themselves, whose interests are jealously regarded by the Courts and dealings with whom have to be shown to be fair and above board by the creditor at the outset. We hold therefore that the case must be treated as an ordinary case of debtor and creditor, and that the *onus* of proof of all the disputed facts is, on the pleadings, on the defendant Fateh Ali Shah. *Moti, Gulab Chand, &c. v. Mahomed Mehdi, Tharia Toan, I. L. R., XX Bom., 367*, is clearly distinguishable.

We propose first to briefly consider the evidence with reference to the male defendant, and to take up the case as regards the female defendant last.

There is a formidable mass of documentary evidence against the defendant complete in every respect. In fact the completeness is used as an argument, possibly not without some show of reason, against the plaintiff. But nothing tangible can be inferred from this to the plaintiff's detriment,

while legally the defendant has to discharge the burden of showing them to be wrong. In proof of the first loan, there are—the promissory note, page v, and the receipt, page iv, and the letter, page vi; of the second, the promissory note, page i, the receipt, page viii, and the endorsement on the old note, and the letters, page ix and page x. There are two other letters, page iii and page vii, which also corroborate the plaintiff's story. The first asks for the loan of Rs. 6,000, and admits that jewels worth Rs. 5,000 have been inspected and approved. The second admits the first loan, and makes proposals for the second. In addition to these the letter, page xi, dated 12th July 1896, after the note sued on had fallen due and about seven months after the last of the transactions, seems completely to refute the defendants' allegation. There is no adequate explanation why he did not then repudiate his liability if his present story is true. Similarly the telegram, page xiii, sent to plaintiff after the institution of the case goes some way to strengthen the plaintiff's case.

Against this mass of documentary evidence, all admitted to be genuine, defendant has nothing to oppose but the oral testimony of a few servants, descendants or friends. This evidence has been minutely and carefully criticised by the District Judge, and we substantially agree with his remarks. It is absolutely impossible to rely on it and to hold that the defendants' allegation that only Rs. 1,500 worth of jewellery was given, and that plaintiff promised not to exact more if payment was punctually made.

The plaintiff has on his side produced oral evidence of the loan transactions which the District Judge considers superior in quality. We also agree in this opinion, supported as it is by the documentary evidence. There is absolutely no trace in the whole evidence of anything to lend support to the defendants' story. Plaintiff offered himself as a witness in his case, but defendant did not do so, though he was examined before the issues were framed.

There is little doubt that the plaintiff made a very handsome profit out of the loan transactions, but unless the defendants' allegation is established in fact we have no power to interfere with the contract. If the defendant has taken jewels at much above their value because he wanted them and could not have them on other terms he has no claim to ask the Court to relieve him of the consequences of his deliberate act. There is an equity founded upon the gross inadequacy of consideration,

but it can only be when the inadequacy is such as to involve the conclusion that the party either did not understand what he was about, or was the victim of some imposition, *per Lord Westbury in Tennant v. Tennants, L. R. I. (P. C.) Ap. 6.* This is not proved to be the case here. The appeal of this defendant must therefore fail.

As regards the female defendant we have, on the whole, no sufficient ground to differ from the view of the lower Court. The evidence in support of her presence is ample, if it is believed. The letter, page vii, corroborates the plaintiff's story. There is some discrepancy in the evidence as to her being in *parda*; but as it is admitted that she was a courtesan before her marriage with Fateh Ali Shah, her presence is not at all extraordinary. The jewels were probably approved by her as letter, page iii, says. The story of her husband forging her mark on all the documents bearing it is incredible. Defendants' evidence, as already stated, is practically worthless. It is to be noted that Mussammat Lalan Bibi never went into the witness box and denied her presence at Lahore, or her marks. Having regard to her antecedents there is no reason to doubt that she was well able to look after her own interests, and there is no objection that her consent was improperly obtained.

The appeal is dismissed with costs.

For reasons given in the judgment of the District Judge we decline to allow any further interest, and dismiss plaintiff's cross-objection with costs.

Appeal dismissed.

No. 61.

Before Mr. Justice Chatterji and Mr. Justice Gordon Walker.

SHAMAN AND OTHERS,—(PLAINTIFFS),—APPELLANTS,

Versus

SARDHA AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

} APPELLATE SIDE.

Case No. 520 of 1896.

Custom—Alienation—Escheat—Right of proprietary body to contest alienation by widow of childless proprietor—Kangra District—Right to sue.

Found, that there is no custom by which, in the Kangra District, the estate of a childless proprietor escheats (after the death of the widow of such proprietor) to the village community or the owners of the sub-division in which the land is situate.

Although under the existing revenue system two ingredients of jointness have been introduced among artificially created village communities, *viz.*, (i) joint right in the waste attached to each village, and (ii) joint liability for the revenue assessed on the village, the right of escheat is not a necessary consequence of such jointness, nor has it been declared to be so by any statutory provision.

Held, further, that even if by custom the widow of a childless proprietor was incompetent to alienate, or to give a valid title, except for necessity, it was not open to one who was not a reversioner to sue to set aside her act, and that in such a case the plaintiffs must succeed on the strength of his own title and cannot derive help from the widow's incapacity to alienate.

The question as to the reversionary rights of the proprietary body in such cases discussed historically by *Chatterji, J.*

Further appeal from the order of O. P. Bird, Esquire, Divisional Judge, Hoshiarpur Division, dated 5th January 1896.

Lal Chand, for appellants.

Jaishi Ram, for respondents.

The facts of the case sufficiently appear from the judgment of the Court delivered by

10th June 1898.

CHATTERJI, J.—This appeal and No. 521 of 1896 are closely connected and practically the same points arise in both. They will therefore be disposed of by one judgment.

The material facts appear from the judgment of the Court of first instance. It is only necessary to note that in this appeal the subject of dispute is land sold to Sardha, respondent, by Mussammat Bhandejo, deceased, widow of Mussammat Ambo's husband's brother, and in appeal No. 521, land gifted by Mussammat Ambo to Kharku, respondent. The plaintiffs in both cases are the proprietors of *tika* Panditehr in *manza* Passu, *tahsil* and District Kangra.

The plaintiffs claim declaratory decrees to the effect that the alienations by the widows would not effect their reversionary right to the lands alienated on the deaths of the widows, alleging that they are by law and custom entitled to succeed to the lands, as there are no heirs of the women's husbands. The substantial contentions on the part of the defendants are (1) that the plaintiffs have no vested right of escheat and have therefore no *locus standi* to sue, and (2) that the widows in the absence of heirs of their husbands have uncontrolled power of alienation under the *Riwaj-i-am*.

The first Court found that plaintiffs have the right of escheat by custom, and that the *Riwaj-i-am* only permits gifts

but not other kinds of transfer. It upheld a gift made by Mussammatt Ambo in favour of one Shansa and dismissed the plaintiff's suit in regard to it which was jointly tried with the cases under appeal on this ground and plaintiffs did not carry that case any further. But it set aside the gift in favour of Kharku on the ground that the gift was not admitted by Mussammatt Ambo and the possession of the donee was not shown by the revenue papers.

The Divisional Judge after remanding the cases for a further inquiry into custom found, in concurrence with the return of the officer who made the investigation, that the plaintiffs had failed to prove that the lands revert to them as owners of the *tika* in which they are situate, and that the custom is correctly recorded in the *Riwaj-i-am*, transfers for value being *à fortiori* valid when gifts are permitted. He held the gift to Kharku was complete.

Appellants' counsel directed his argument to establish two main points: *First*, he maintained that under circumstances, like the present, the proprietary body of the village or of the sub-division in which the land is situate are, by the general custom of the Punjab, entitled to succeed on the death of the widow, and that they have in consequence a sufficient *locus standi* to contest the widow's alienation; *secondly*, he insisted that the limitations upon the widow's estate are the very substance of its nature and not merely imposed for the benefit of reversioners, and that they exist fully even if there are no heirs at all. He quoted numerous authorities in support of both positions and challenged the correctness of the entry in the *Riwaj-i-am*.

With reference to the first point we are unable to accede to the contention that there is a universal custom of the kind mentioned in the Punjab. The authorities on the subject are conflicting. They are all collected and reviewed in No. 77, *Punjab Record*, 1896, and the conclusion arrived at was that no such general rule could be laid down. Counsel insists that this is an error, but we are unable to agree with him. Admittedly the authorities are not agreed on the point and opinions in support of appellants' view are opposed by others entitled to equal weight affirming the contrary. It appears to us difficult to lay down a rule of general application in a matter of this kind merely upon *à priori* grounds. Much would depend upon the facts of each case and the constitution of the village. In a village held on a strictly tribal tenure, or in which the

community is a compact one, the probability is that heirless land would be taken possession of by the tribesmen or the community, and that strangers would be excluded. It would perhaps be reasonable to presume even in the absence of actual instances that in the past and particularly in unsettled times they were able to assert and enforce this right with the support of public opinion and if necessary by physical force. The right of escheat would have an historical foundation in such communities. But no such inference can be drawn where the proprietors are a heterogeneous body and where possession is essentially the measure of right. Here the right of escheat ought to be affirmatively established by cogent evidence. It would not always be safe to assume the existence of such right merely because under the existing revenue system there is a joint liability for revenue or where such land exists, because there is some common waste land for pasture and other purposes. In many cases as shown in No. 77, *Funjab Record*, 1896, it was found on actual inquiry that the right did not exist. Considering the diverse character of village tenures in this Province, it is obviously unsafe to formulate a general rule on the subject of escheats to village proprietors. We therefore see no good reason to differ from the view taken in the case above cited.

Further even if it could be held on the strength of the authorities cited by appellants that the custom of escheat set up by them can be presumed to exist in certain parts of the Province it would be impossible to extend the presumption to villages in the hills of Eastern Punjab. Land in the Kangra District is not ordinarily held on tribal principles, and a village community there is something very different from a village community in the plains. In theory a Punjab village is ordinarily a piece of land originally waste acquired by conquest, purchase or other manner and settled upon and brought under cultivation by one or more members of a single tribe, or by a number of persons or families belonging to two or more tribes associated for this purpose. The entire proprietary right belongs to the founders or their descendants subject to payment of revenue dues to the ruling power. In the hills before the advent of British rule each Raja was theoretically the landlord of the entire area included within his *raj* or principality. He was as it were the manorial lord of the whole country. He was the acknowledged fountain of all rights in the soil and no tenure was complete without investiture from

him. This distinction is the key to the proper understanding of the hill tenures. The difference between a village or *mauza* in the plains and one in the hills is also very well marked. To quote the words of Mr. (now Sir James) Lyall: "In the plains the boundaries of a *mauza* are the boundaries of a property, but in the hills the boundaries have no more to do with property than have those of a parish in England at the present day, and as parishes grew out of one person taking the tithes so these *mauzas* or circuits seem to have grown out of one man for a length of time collecting the land rents either as an agent or an assignee of Government The circuit as regards its waste lands was a mere arbitrary and loosely defined division of the principality. As regards its cultivated lands it was a chance collection of independent family holdings." As regards individual holdings, the highest form of property recognised in the hills was the hereditary right of cultivation, *warisi*. This right was conferred by a deed of grant or *patta* from the Raja. A *patta* was never granted for a whole village or for a whole hamlet, nor for a block of country containing waste as well as arable land, but always for specified fields or culturable plots alone of which not only the rent but the name and area were specifically entered on the deed, and the grantee ostensibly acquired no title beyond the four corners of his *patta* (Gazetteer of the Kangra District, pages 105, 106). Mr. Lyall thus describes this class of landholders ". . . . The landholder was rather a crown tenant than a landlord. He called his right a *warisi* or inheritance, not a *malki* or lordship, and the same term applied to every kind of interest held of the Raja" (Settlement Report, page 22).

This was the condition of the land tenures before the British conquest. The consequences that ensued upon the substitution of British for native rule are thus summarized in the Gazetteer: "The introduction of the British rule was immediately followed by a settlement of the land revenue upon principles imported from the plain country of the North-Western Provinces. Under the transforming hand of the officer, who conducted the settlement, the loose circuits of the Rajas became estates in a technical sense, i.e., revenue-paying units. Boundaries were set up defining the limits of villages and (south of the Beas) of hamlets, in the waste, and of the areas thus defined the holders of the cultivated plots were declared to be joint proprietors in the sense in which that term is used in the plains. In other words, the

“body of landholders in each circuit were converted into a
“proprietary community, each sharer in which was proprietor
“of his own holding and co-proprietor with his fellows in the
“waste. Moreover the whole area of the district, waste as well
“as cultivated, was included in the village boundaries then for
“the first time laid down as a natural corollary
“to this, when the time came for assessment the revenue of
“each circuit was assessed as a lump sum for the payment of
“which the whole body of landholders became jointly responsi-
“ble during the term of settlement. Great as this revolution
“was, it appears to have been quietly acquiesced in by the
“people who indeed were considerable gainers by the innovation,
“for with the right of property acquired in the waste the
“village communities received by way of compensation for the
“imposed responsibility, the right to collect and divide among
“themselves certain items of income arising from it, which
“formerly were included in the regular land rents in the
“annual collections made by the State. In the changes thus
“effected the individual holdings of the cultivated land alone
“remained unmodified. Upon these the effect of the settlement
“proceedings was to confirm the tenure, making it *de jure* as
“well as *de facto* proprietary” (pages 112, 113).

The foregoing extracts show in our opinion the futility of the contention that in the Kangra District by custom the estate of a childless proprietor escheats to the village community or the owners of the sub-division in which the land is situate. There was formerly no ownership, no village community. There could therefore be no escheat to the latter, and if there was any escheat at all it must have been to the Raja or ruling authority. The claim of the plaintiffs has no historical foundation, but is one unknown to the country and supported by false analogies drawn from tenures prevailing elsewhere, the features of which are wholly dissimilar. It is true that under the existing revenue system two ingredients of jointness have been introduced among these artificially created village communities—(1) joint right in the waste assigned to each village, (2) joint liability for the revenue assessed on the village. But the right of escheat is not a necessary consequence of this jointness, nor has it been declared to be so by any statutory provision.

We are of opinion therefore that there is no presumption whatever in favour of the right claimed by the plaintiffs in this case, and that the authorities cited, even if they are correct,

have no application to that part of the country where the disputed land is situate. We are, therefore, unable to accede to counsel's prayer that the question might be referred to a Full Bench. Plaintiffs are bound to affirmatively prove the right of escheat by reliable legal evidence.

That village proprietors in the hills have, since the introduction of the British revenue settlements, been allowed to take possession of lands of heirless owners in some instances may be admitted. The areas would ordinarily be small, and the crown seldom cares to enforce its right of escheat as it rarely likes to take upon itself the direct management of land. Such cases prove nothing in favour of the plaintiffs, and in fact sufficient time has not elapsed since the advent of British rule for a new custom of this kind, foreign to the traditions and institutions of the people to grow up and acquire a binding effect over the whole community. The instances adduced by the plaintiff therefore hardly merit a detailed notice, and though counsel have discussed them at considerable length a brief examination of them will suffice.

The first two witnesses of the plaintiffs, Mansukh, Lambardar, and Fakiria simply say that the heirless land reverts to the *tika*, and quote two instances, one from Rehlu and the other from Sidhbari. These are not in point. They also say that a widow without reversioners can be restrained from making alienations without necessity by the owners of the *tika*, but can cite no instances. The third witness, Bysakhi, quotes two fresh instances, one of which from Sarah is a mere case of reversion. The other is said to have been a case in which the widow's alienation was successfully impeached in Court by the owners of the *tika*, but the file has not been produced, and it is not possible to say how far it is relevant. The fourth witness, Misra, quotes an instance from Narli similar to the last, but there is no record to show its real nature. He also cites another from Banihar, but does not give names or details, and consequently no weight can be attached to it. This is the whole of the oral evidence of the plaintiffs on the point of custom, and it cannot be said that their case is much advanced thereby. It is unnecessary to notice defendants' oral evidence at length. Their witnesses quote numerous instances in opposition to the plaintiffs' contention, but they cannot be said to be of much value as they rest on mere oral testimony and the details are not sufficient. In the remand inquiry more definite evidence was produced by them, but it related to the correct-

ness of the entry in the *Riwaj-i-am* rather than to the point of custom we are discussing, though it has a material bearing on it. It will be adverted to again. Upon a comparison of the oral evidence on both sides there is little difficulty in holding that defendants' evidence is at least as good and if not better than that of the plaintiffs, and that the latter is insufficient to establish the plaintiffs' case.

Turning now to the cases in Court. There are two mutation cases (1) of land left by one Mussammat Jalli in *mausa* Rori-kori, who died heirless, which, by order of the Commissioner dated 30th September 1880, was entered as *shamilat* of the village; (2) of land left by a *Sudni* of Nuti, Mussammat Pakru, who also died *lawaris* according to the report of the lambardar who wanted it to be recorded as *shamilat* of the *tika*, and this was allowed on 18th May 1882. There were no objectors in either case, and they are not of any value on the question before us.

Of the cases decided in the Civil Courts only three have any bearing, and they are:—

- (1). *Durgu, plaintiff, v. Totu and others, proprietors of tika Noushera, in Rehlu, defendants* (1891).—This was a claim by the brother of a widow for some land which she had inherited from her husband on the strength of a gift alleged to have been made by her. The gift was not proved, and the possession of the owners of the *tika* was maintained. The Divisional Judge declined to go into the question of the relative priorities of the plaintiff and the defendant to succeed as heir holding that plaintiff had sued on the ground of a gift alone which he had failed to establish.
- (2). *Ohartu, &c., plaintiffs, v. Badri, &c., defendants*.—The former as proprietors of *tika* Panag in the village of Katrah, claimed possession of land left by one Harbhaj who died heirless. The Divisional Judge, Mr. Bullock, was of opinion on grounds similar to those mentioned in our judgment, that there was no escheat to the plaintiffs, but nevertheless in deference to the views of the Chief Court expressed in No. 80, *Punjab Record*, 1885, found in their favour. On appeal to the Chief Court a further inquiry was made, and it was

found that one of the plaintiffs, Nanak, was related to the deceased in the female line, and on the ground that he had a superior right to the defendants, the decree was upheld by Mr. Justice Benton on 3rd April 1890.

- (3). Sansar Singh and others, plaintiffs, *v.* Golaba and others, defendants. The plaintiffs were the proprietary body of *tika uparla* of Bunhar, while the defendants claimed to be mortgagees and vendees of different portions of the land in suit. The plaintiffs *locus standi* was disputed, but impliedly upheld up to the Chief Court.

It will be seen that there is only one case, *viz.*, the last, which supports the plaintiffs' claim, but even here there was no exhaustive inquiry and the considerations adverted to by us and mentioned by Mr. Bullock in his judgment in the second case were not discussed and disposed of. It is insufficient by itself in the absence of other proof to establish the plaintiffs' claim.

The *Wajib-ul-arz* does not recognize any such right as is claimed by the plaintiffs. Clause 31 only provides for land left by absentees who have no relations in the *tika* or village.

We accordingly hold that plaintiffs have failed to show that they are entitled to the land by escheat according to the custom of the country. They cannot, therefore, be treated as the presumptive reversioners of the widows Mussammat Ambo or Mussammat Bhandejo. It may be mentioned here that the proprietors of the plaintiff's *tika* are a mixed body consisting of Rajputs, Grisths and others, and that there is not a single Jat among them besides Mussammat Ambo.

As regards the second point argued by counsel, we are of opinion that the cases quoted by him, even if applicable, do not help his clients. The decision of their Lordship of the Privy Council in *Cavalry Vencatas* case, 8 M. I. A., 520, was upon Hindu Law, while the parties here are presumably bound by custom. But assuming that the ruling applies it only shows that the widow cannot give a valid title if she alienates without necessity, but does not enable a person who is not a reversioner, or is a mere stranger to sue to set aside her act, *Mayne's Hindu Law*, 5th Edition, Section 599, *Brojo Kishore Dasee v. Sree Nath Bose*, IX W. R., 463. Had the plaintiffs got possession they might possibly, if no custom against them was found,

have successfully resisted claims by the alienees for possession on the ground that the transfers in their favour were void and conferred no right. But the case is different when plaintiffs seek to have the deeds declared invalid. They have then to succeed on the strength of their own title and to establish their *locus standi*. They can derive no help from the widow's incapacity for alienation.

In the present case the *Riwaj-i-am* supports the contention of the defendants. It is true that it only speaks of gifts, but transfers for consideration are *à fortiori* within the rule. The remand inquiry shows the custom at all events prevails among the Jats, and the plaintiffs have failed to produce sufficient rebutting evidence. For the purposes of the present case the finding of the Divisional Judge should therefore be upheld. Whether the evidence is sufficient to defeat any right of escheat the crown may possess in cases of this kind is a question into which we need not enter. There is no claim by the crown and the plaintiffs are not the assignees of the crown.

On all grounds therefore the plaintiffs' claims fail and have been rightly dismissed. As regards the gift to Kharku the present suit decides nothing between him and Mussammat Ambo, but it is clear that so far as the plaintiffs are concerned the gift is perfectly good.

The appeal is dismissed with costs.

Appeal dismissed.

No. 62.

Before Mr. Justice Chatterji and Mr. Justice Anderson.

APPELLATE SIDE.	{	RANA GANPAT SINGH,—(PLAINTIFF),—APPELLANT,
		<i>Versus</i>
		KANGRA VALLEY SLATE COMPANY,—(DEFENDANTS),—RESPONDENTS.

Case No. 910 of 1896.

Easement—Right of way—Public or private road—"Question of law"—Limitation Act, 1877, Section 26—User of road by public for less than 20 years—Presumption as to dedication—English law.

The principles of the English law regarding the presumed dedication of a road to the public arising from user of such road by the public, being founded on reason and commonsense and conducive to public convenience, are applicable to India.

Held, therefore, that the user of a road by the public, openly and as of right, is sufficient, apart from the law laid down in the Limitation Act

1877, Section 26, to raise a presumption of its dedication to their use, though such presumption might be rebutted by evidence of the owner's intention that the public should only have a permissive user.

In the present case the evidence clearly showed that the road in dispute had been used as a public road for at least 10 years prior to suit, but the Divisional Judge, treating the case as one of prescription, found in favour of defendants because 20 years had not elapsed since the road was opened (Section 26 of the Limitation Act, 1877).

Held, under the circumstances as above set forth, that there was a presumption that the road had been dedicated to the use of the public, and found, upon the evidence and facts of the case, that defendants had failed to rebut such presumption.

The right of the public to pass over a public road is not in the nature of an easement properly so called, nor is it acquired by prescription under Section 26 of the Limitation Act, 1877.

A preliminary objection on behalf of defendants that there was no ground for admitting a further appeal in the case as there was no "question of law" involved, overruled on the grounds that the questions (a) whether plaintiff had not acquired a right of way over the road in dispute either by long user or grant; (b) whether the road came under the category of a public or a private road, involved consideration of points of law, and were not simple questions of fact.

Held, further, that the Divisional Judge's error in law in deciding the point under Section 26 of the Limitation Act was of itself a sufficient ground for admitting a further appeal, though it was not the ground on which the appeal was admitted by the Judge in chambers.

Further appeal from the order of C. P. Bird, Esquire, Divisional Judge, Hoshiarpur Division, dated 27th November 1895.

Jaishi Ram, for appellant.

Beechey, for respondents.

The facts of the case sufficiently appear from the judgment of the Court delivered by

CHATTERJI, J.—The facts of this case sufficiently appear from the judgments of the lower Courts. The suit is to establish the plaintiff's right of way over the road marked P. M. X. N. Y. on the plan filed in the first Court on the ground that the road is a public one, and that plaintiff has been unlawfully prevented by the defendants from going over it. There is also a question whether the plaintiff's pleadings include a claim on the ground of an easement, but it is strongly objected on the respondents' side that they cannot do so.

1st July 1898.

The substance of defendants' contention was that the portion of the road marked X. N. Y. is private and belongs to them. This formed the subject of the first issue.

The first Court found that X. N. Y. was a public road and decreed the claim. On appeal the Divisional Judge declared the portions P. X. and N. Y. to be parts of a public road, but the part X. N. to be a private road and the property of the defendants and modified the first Court's decree to this extent.

The portion N. Y. runs past the godowns of the defendants and over ground belonging to them. Their counsel contends that this part of the decree is due to a mistake of the Divisional Judge, and that the public road begins from the point Y., but they did not appeal, and it is obvious that for the purposes of this case N. Y. must be held to be a public road.

A preliminary objection taken by the respondent may be noticed here. It was contended that there was no ground for admitting a further appeal as there was no point of law involved, and the finding that X. N. is a private and not a public road is a finding of fact. The point raised by the learned Judge who admitted the appeal, viz., whether plaintiff had not acquired a right of way over X. N. either by long user or grant is a point of law, and the objection that it does not arise on the plaint and the pleadings and is not therefore involved in the case is one relating to the merits of the case and not a preliminary objection. The contention was therefore overruled and the hearing proceeded on the merits. Moreover the question whether the road X. N. comes under the category of a public or a private road is one involving consideration of points of law and is not a simple question of fact. The Divisional Judge in deciding it has applied the law of prescription laid down in Section 26 of the Limitation Act.

The evidence on both sides clearly shows that the whole road, including the portion X. N. or X. Y., is used as a public road, and has been so used for at least ten years. In 1883 the greater part of it was constructed by the defendants with the help of the District Board of Kangra which contributed half the cost of construction, Rs. 242, but the portion X. N., if not the entire length X. Y. (though apparently the Divisional Judge finds otherwise), was not made as Singhara, the owner of the land, through which it runs, did not agree to its being made, *vide* letter of Mr. Connor, Engineer and Manager of the defendants' company, dated 19th March 1894. There was, however, an old pathway Q. O. which was public. In June 1885 defendants purchased the land of Singhara and filled up the gap between the portions of the road made in 1833 by con-

structing the portion X. N. The old path Q. O. then fell into disuse, and the whole of the new road, including the portions X. N. and N. Y., was used by the public without any objection or hinderance on the part of the defendants.

It would appear from the correspondence with the District Board that defendants' Manager in obtaining pecuniary aid from the Board gave some indication of an intention that the road would be for the benefit of the public, *vide* Mr. McBean's letter, dated 11th June 1883, written under the authority of Mr. Masson, the Managing Director, asking for the contribution of Rs. 242. It speaks of conferring a boon on the public who deal with the company by making the road. This of course does not show that the road was to be a public one, but the subsequent letter of Mr. Connor, dated 9th March 1884, speaks of the break at Singhara's field, and asks that at the time of inspection it might "be considered whether it would not be "advisable for the company to acquire sufficient of the above "land to make the road, as it is required for a public purpose, "the company bearing the cost of the land and of making the road." The Board did not help to acquire the land which the defendants purchased next year and the letters themselves, though they do not establish any definite promise to make the road or the portion X. N. public, help to throw light, taken in connection with the surrounding circumstances and the other evidence and the admission of the defendants as to the use of the road, on their intention in making the road.

The natural inference from the evidence and the use of the road as respects this intention is that it was to make the road a public one and this is strongly supported by the fact that the old public pathway Q. O. now disused for which X. N. and N. Y. have been substituted is now included in the cultivation of the defendants' tenant Singhara. The land through which the portions X. N. and N. Y. run is no doubt defendants' private property, and no doubt they were constructed with defendants' money, but these facts are not inconsistent with their being parts of a public road. The public user of the road has lasted at least ten years, and this is sufficient as we understand the law applicable to the subject to establish the right of the public in the absence of cogent rebutting proof on the part of the defendants. The Divisional Judge has treated the case as one of prescription and found in defendants' favour, because 20 years have not elapsed since the road was opened, but this is a clear mistake. The right of the public to pass over a public road is not in the nature of an

easement properly so called, nor is it acquired by prescription under Section 26 of the Limitation Act. Mr. Beechey for the respondents admits that the Divisional Judge's view is erroneous, but urges that the finding that the road is not a public road is independent of the above argument and is given at an earlier part of the judgment, and that it is only used to strengthen that finding and to meet a possible contention on the part of the plaintiff. This, however, does not appear to be the case. The Divisional Judge gives no reasons for holding the road not to be a public road in spite of the use by the public except in the passage in question. In an earlier part of the judgment he merely recites the fact of the purchase by the defendants, and says the land as well as the road is private. In the passage referred to he gives his reasons for his opinion which are (1) that 20 years had not yet elapsed, and (2) no public money had been spent on the portion X. N. In finding the road not to be a public one as claimed by plaintiff the Divisional Judge appears thus to have committed an error in law which of itself is a sufficient ground for admitting a further appeal in this case, though it is not the one on which the appeal has been admitted.

By the law of England public rights over a highway rest upon a dedication express or presumed from user by the public. The whole is pithily summarized in the following passage in Dart on *Vendors and Purchasers*, 6th Edition, Volume I, page 411. "A road may be a common highway even, though it is "only occasionally used by the public, or is circuitous or does not "terminate in a town or in some other public road, and a very, "short continuous user of it by the public openly, and as if right "is sufficient to raise a presumption of its dedication to their use, "but the presumption may be rebutted by evidence of the owner's "intention that the public should only have a permissive user as "e. g., by his arbitrarily closing the way for one day in each year "or by showing that the state of the title was such that a binding dedication was impossible, but mere non-user for any "number of years will not destroy or prevent the public from "resuming the right to a public way, though it may be evidence "that no such right ever existed. The soil of a road, whether "public or private, *usque ad medium filum viae*, is presumed to "belong to the adjoining owners" In Smith's *Leading Cases*, Volume II, 9th Edition, page 165, the mode of creation of public highways is thus stated: "Except where this "is done by the express enactment of the legislature, it derives

“its existence from a dedication to the public by the owner of
“the land over which the highway extends of a right of passage
“over it, and this dedication, though it be not made in express
“terms as it indeed seldom is, may and will be presumed from an
“uninterrupted use by the public of the right of way claimed.”
In *Rugby Oharity v. Merry Weather* (11 Ea., 376n), a period of
six years’ user was held sufficient proof of dedication. In *Queen*
v. Petrie, &c., 24 L. J. Rep., Q. B. 167, and *Powers v. Bathurst*, 49
L. J. Rep., Oh. 294, it was laid down that an open user as of right
by the public raises a presumptive inference of dedication
requiring to be rebutted and that the *onus* of displacing the
presumption lies on the person seeking to deny the inference
from the public user. In *Woodyer v. Hadden*, 5 Taunt., 12,
Chamber, J., said: “No particular time is necessary for evidence
“of a dedication. If the act of dedication is unequivocal it may
“take place immediately. For instance, if a man build a double
“row of houses opening into an ancient street at each end
“making a street and sells or lets the houses that is instantly
“a highway.”

The above principles have been held to apply to India,
being founded on reason and commonsense and conducive to
public convenience. In *J. Anderson v. Juggodumba Debi*, 6 Calc.
L. B., 282, the presumption in regard to dedication from user
were held to govern a case from the *mafussil* in Bengal. In
Nihal Chand v. Asmat Ali Khan, I. L. R., VII All., 362, the
rule about ownership of land of disused highways was followed.
So also in regard to obstructions of public roads the remedial
provisions of English law have been held to regulate this
right of suit.

Adverting now to the facts of the present case, we must
hold with reference to the above authorities that in the absence
of cogent rebutting evidence on the part of the defendants,
the whole road, including the portion X. N. declared private
by the Divisional Judge, is a public road. The previous
correspondence and the other circumstances mentioned above,
as well as the unanimous testimony of witnesses on both sides,
show an intention on the part of the defendants to make the
road public and are sufficient to prove a dedication of it as
such by them, and the *onus* is on them to prove the contrary.
This they have failed to do. Nor is it open to them now to
say that they have changed their original intention and are
not willing to let the public use the road. In fact they have
not even said this much for the general public are not hin-
dered from going over the road, but it is only the plaintiff that

is not permitted to do so, according to the Divisional Judge, because Mr. Seale, the defendants' manager, has a long standing quarrel with him. There was no objection taken that on the assumption that the road is a public one, the plaintiff's suit to establish the right to pass over it did not lie, but had it been the above fact would have furnished a complete answer. Similarly it is a complete answer to the contention that if X. N. were declared a public road it would depreciate the value of the defendants' property. They have filed no appeal in respect of N. Y.

We find therefore that the road X. N. is part of a public road, and that the plaintiff is entitled to pass over it without obstruction by the defendants.

We accept the appeal and restore the decree of the first Court with all subsequent costs.

Appeal allowed.

No. 63.

Before Mr. Justice Chatterji and Mr. Justice Anderson.

PRITHA DAS,—(PLAINTIFF),—APPELLANT,

Versus

HIRA SINGH,—(DEFENDANT),—RESPONDENT.

Case No. 992 of 1896.

APPELLATE SIDE. {

Suit for recovery of money paid to agent for unlawful purpose—Suit instituted before execution of unlawful object—Principal and agent—Contract Act, 1872, Section 23—Locus penitentis.

Plaintiff sued on the allegations that he paid a sum of Rs. 800 to the defendant, a friend of his, to procure him a bride; that defendant had represented that this sum was to be paid to the bride's father in advance, and the betrothal performed on the 9th Nauratra; that no betrothal had taken place, and that defendant on being asked to refund had denied the receipt of the money. Defendant denied the transaction altogether. The first Court found that plaintiff's allegations were proved and that he was entitled to recover, but the Divisional Judge, on appeal, held that the defendant had undertaken to act as a mere procurer, that the contract was opposed to morality and public policy, and, following No. 116, *Punjab Record*, 1880, dismissed the suit without going into the facts. Plaintiff appealed to the Chief Court.

Held, that inasmuch as, upon the true construction of the transaction, defendant was merely a go-between or agent of the plaintiff for paying the money to the bride's father, the property in the money did not pass to the defendant but remained with the plaintiff so long as it continued in defendant's hands or until it was paid over to the father of the intended bride.

Held, therefore, that the suit was maintainable.

A person who pays money to his agent, whether on the agent's representation or of his own motion, for an unlawful purpose is entitled to a *locus penitentis* and can call back his money at any time before the purpose is executed, nor in such a case can the agent, merely because he was entrusted with an unlawful commission, repudiate his liability to refund and appropriate the money to his own use.

I. L. R., XXIII Cal., 962; *I. L. R.*, XVIII Mad., 388; No. 106, *Punjab Record*, 1879; No. 50, *Punjab Record*, 1880; No. 116, *Punjab Record*, 1880; No. 128, *Punjab Record*, 1889; *Taylor v. Bowers* (*L. R. I.*, Q. B. D., 291) and *Kearley v. Thomson*, (*L. R.*, XXIV, Q. B. D. 747), referred to.

Further appeal from the order of Sardar Gurdial Singh, Man, Divisional Judge, Ferozepore Division, dated 3rd July 1896,

Krishen Singh, for appellant.

Morton, for respondent.

The judgment of the Court was delivered by

CHATTERJI, J.—In this case the plaintiff alleged that he gave Rs. 300 to the defendant, a friend of his, in order to procure him a bride, that defendant had represented that this sum was to be paid to the bride's father in advance and the betrothal performed on the 9th *Nauratra*, that no betrothal had taken place, and that defendant on being asked to refund had denied the receipt of the money. 4th July 1898.

Defendant denied the transaction altogether and pleaded that suit was false and had been lodged for an ulterior purpose.

The first Court found the plaintiff's allegation proved and that he was entitled to recover. It therefore gave plaintiff a decree. The Divisional Judge held that the defendant had undertaken to act as a mere procurer, that the contract was opposed to morality and public policy, and, following No. 116, *Punjab Record*, 1880, dismissed the suit without going into the facts.

In our opinion the Divisional Judge has acted on an erroneous view of the law. Payment to the guardian of a minor girl in order to secure his consent for her betrothal and marriage to the plaintiff was held to be improper and opposed to public policy in No. 128, *Punjab Record*, 1889, F. B., and the contract was held to be void. But the present defendant was a third party who undertook to procure a bride by paying the money advanced by the plaintiff to the girl's father. The case is not similar to No. 116, *Punjab Record*, 1880, where the money was actually paid away by the defendant to the bride's reputed mother and the marriage performed, but appears to be exactly

on all fours with No. 50, *Punjab Record*, 1880. In No. 106, *Punjab Record*, 1879, a suit by the bridegroom for money paid to the bride's father in consideration of his daughter's marriage with the former was held to be maintainable, the marriage not having been performed, the Court mainly relying on the rule of English law that money paid under an unlawful agreement may be recovered back when nothing else has been done in performance of it. Here the money had not been paid to the defendant as his remuneration for the trouble in procuring a bride but merely as an intermediary to pass on to the bride's father. These being the facts, there could be no hesitation in deciding it in accordance with No. 50, *Punjab Record*, 1880; but for the circumstance that the principle of English law on which No. 106 of 1879 was decided has been questioned of late years. The doctrine laid down in *Taylor v. Bowers*, *L. R. I., Q. B. D.*, 291, and the earlier cases was doubted in the recent case of *Kearley v. Thomson*, *XXIV Q. B. D.*, 747. Sir Frederick Pollock in the 6th Edition (1894) of his work on *Contract* lays down the rule to be that such money cannot be recovered back "unless nothing has been done in the execution of the unlawful purpose beyond the payment" itself, and doubtfully adds the proposition "and the agreement is not positively criminal or immoral" (pages 368, 369). *Kearley v. Thomson* was cited with approval in *Rangammal v. Venkatachari*, *I. L. R., XVIII Mad.*, 388. Sir W. Anson, *Law of Contract*, 8th Edition, page 218, is of opinion that the authority of *Taylor v. Bowers* is much shaken by the opinion expressed by the Court of appeal in *Kearley v. Thomson*, that the principle acted on in the former case "may at some time hereafter require consideration, if not in this Court yet in a higher tribunal."

After giving the matter our best consideration, however, we are of opinion that the rule would hold good for a case of the present description, and that the money is recoverable. It must be borne in mind that there is strictly speaking no contract that the defendant should receive the money in consideration of procuring a bride for the plaintiff. Had this been the case the decision would probably have been more difficult. But when the transaction between the parties is analysed it appears that defendant is simply a go-between, a mere agent of the plaintiff, for paying the money to the girl's father. That being so, the property in the money did not pass to the defendant, but remained with the plaintiff as long as it continued in defendant's hands, or until it was paid over to the father of the intended

bride. We are of opinion that a person who pays money to his agent, whether on the agent's representation or of his own motion, for an unlawful purpose, is entitled to a *locus penitentis* and can call back his money at any time before the purpose is executed. The agent cannot, merely because he was entrusted with an unlawful commission, repudiate his liability to refund under such circumstances and appropriate the money to his own use. A man does not forfeit his right to his property, merely because he has contemplated the performance of an unlawful act. The distinction drawn in *Gobardhan Singh v. Bitu Roy, I. L. R., XXIII Oalc., 962*, supports this view. Moreover, the purpose in the present case, if opposed to public policy, was not criminal or immoral (Section 23, Contract Act, clauses (j) and (k)).

We accordingly hold that the suit is maintainable, and accepting the appeal set aside the decree of the Divisional Judge, and remand the case under Sections 44, Civil Procedure Code, for a decision on the merits. Court-fee on the petition of appeal will be refunded, other costs will abide the result.

Appeal allowed : cause remanded.

No. 64.

Before Mr. Justice Chatterji and Mr. Justice Anderson.

IMAM DIN AND ANOTHER,—(PLAINTIFFS),—

APPELLANTS,

Versus

FEROZ KHAN AND OTHERS,—(DEFENDANTS),—

RESPONDENTS.

} APPELLATE SIDE.

Case No. 203 of 1896.

Landlord and tenant—Suit by tenant who has been ejected for possession—Suit instituted more than one year after ejectment—Punjab Tenancy Act, 1887, Sections 50, 77 (3) (g)—Jurisdiction of Civil Court.

Held, that Section 50 of the Punjab Tenancy Act, 1887, does not restrict the period of limitation allowed to a dispossessed occupancy tenant when suing for possession in the Civil Courts.

Where, therefore, plaintiffs who had been ejected from their occupancy holding in 1888, sued in the Civil Court long before the expiry of twelve years.

Held, that plaintiff's suit was not barred by Section 50 of the said Act.

Further appeal from the order of B. W. Parker, Esquire, Divisional Judge, Rawalpindi, dated 22nd November 1895.

Ishwar Das, for appellants.

The judgment of the Court was delivered by

14th July 1898.

ANDERSON, J.—The facts of this case are made plain by the judgment of the Divisional Judge. He has held that the plaintiffs were, in fact, ejected from their occupancy holding about 1888. They have brought suit in the Civil Court long before twelve years have elapsed since the date of ejectment. The Divisional Judge has held, after fully considering the question, that plaintiffs' only legal remedy was to sue in the Revenue Court under Sections 50 and 77, Sub-Section 3, clause (g) of the Tenancy Act of 1887 which remedy they have lost. He further remarked that the rulings of this Court Nos. 44 and 45 of *Punjab Record*, 1895, furnish authority for holding that a tenant, who allows the period of one year to elapse without filing a suit, must be taken to have relinquished his right to be still regarded as a tenant, subject to any recognized disability.

The point for decision is, as observed by the Divisional Judge in his note annexed to the decision, one of some importance. We have given it our best consideration and referred to the rulings bearing on the question published before and since Act XVI of 1887 came into force.

In *Punjab Record*, No. 54 of 1879, it was held, following *Punjab Record*, 80 of No. 1876, that there is no rule of law that a tenant with rights of occupancy, who has been illegally dispossessed by his landlord, the proprietor, is bound to sue forthwith for recovery of possession and that, if he do not do so and his landlord make arrangements for the cultivation, the tenant's right of occupancy is extinguished. In *Punjab Record*, No. 80 of 1876, it was remarked that abandonment of the land, even for one year, would be evidence from which an intention to give up the right might be inferred, but mere delay in suing does not necessarily lead to the inference that the tenant has relinquished his right of occupancy. These rulings were given at a time when Act XXVIII of 1868 was in force which contained no section corresponding exactly with Section 50 of the Act of 1887, and at that time there was no such distinction drawn between the jurisdiction of the Civil and Revenue Courts as now subsists.

We are unable to agree with the Divisional Judge in holding that it was the intention of the legislature when enacting Section 50 of the new Act to restrict the period of limitation formerly allowed by our Courts to a dispossessed tenant when suing. We consider ourselves justified in adopting this view

to a great extent by the decision in *Punjab Record*, No. 45 of 1891, which was passed after specially considering the reasons stated by Sir Meredyth Plowden in his order referring the case to a Full Bench. The learned Judges thus summed up: "We consider that full effect may be given to the intention of the legislature by holding that, for the purposes of the Act, a tenant who has been dispossessed can, for the period of one year from the date of his dispossession, claim to be still regarded as a tenant *quoad* his landlord, his suit for recovery of possession being (as expressly provided) cognizable by the Revenue Court. If he allows the period of one year to elapse without making any claim he must be taken . . . to have relinquished his right to be still regarded as a tenant and his remedy (if such still exists) as to which it is not necessary to give any opinion upon this reference (*viz.*, a reference under Section 100 of the Punjab Tenancy Act) must be sought in the Civil and not in the Revenue Court." In para. 3 of page 243 of the same volume Sir Meredyth Plowden, Senior Judge, remarked "ordinarily, then a tenant is a person who has a right to hold and does hold, and the person described in Section 50 is a tenant only by an exceptional use of the term tenant, and only as it seems to me, during the period prescribed for bringing this special suit granted to him by Section 50 and for the purpose of exercising this right to sue." See also remarks in para. 5 of page 243 continued in page 244. It is clear from the above that the learned Senior Judge was disposed to construe Section 50 of the Tenancy as enabling rather than restrictive, and we think now that the point which remained undecided in 1895 has come up for decision, that we cannot do better than follow this view which appears to be the most consonant with justice and certainly not, so far as we can see, opposed to any explicit legal enactment.

In the present case both Courts are agreed that plaintiffs were wrongfully dispossessed and defendants' evidence tendered to prove voluntary abandonment was utterly discredited. The plaintiffs, one of whom is a female, have no doubt delayed in suing, but for this some explanation has been offered, and it is not for this Court to go, as it were, out of its way, in order to cast a doubt on the correctness of the finding of the Courts below as to the facts. These being as found, we consider the legal point should be determined in favour of the appellants and for the reasons stated we take a different view from that of the learned Divisional Judge as to the scope of Section 50

of Act XVI of 1887, and hold that the plaintiffs are not debarred by it from bringing the present suit.

We accept the appeal and restore the order of the first Court, but as the point involved was one of some doubt and difficulty we think it fair to order that each party bear his own costs throughout.

Appeal allowed.

No. 65.

Before Mr. Justice Clark and Mr. Justice Gordon Walker.

SHANKAR DAS,—(PLAINTIFF),—APPELLANT,

Versus

KAILASH CHANDAR AND ANOTHER,—(DEFENDANTS),—
RESPONDENTS.

} APPELLATE SIDE.

Case No. 453 of 1896.

Pre-emption, suit for—Sale or contract to sell—Construction of document—Transfer of Property Act, 1882, Section 54.

According to the terms of a certain deed, which was stamped with a one rupee stamp, the vendor undertook to satisfy plaintiff further as to the vendor's title, and to execute a deed of sale within three months, after which, if such deed was not executed, plaintiff might sue for specific performance. The amount of the purchase money was Rs. 15,000, of which Rs. 4,300 was proved to have been paid in cash to the vendor.

Held, that the deed, rightly construed, amounted merely to a contract to sell and not a sale, and that the payment of consideration did not necessarily imply that the deed was a sale.

Held, further, that, under Section 54 of the Transfer of Property Act, 1882, which, though not in force in the Punjab, represents generally the law in force in British India, a contract for sale of immoveable property does not of itself create any interest in, or charge upon, such property.

Further appeal from the order of J. G. M. Rennie, Esquire, Divisional Judge, Lahore Division, dated 9th April 1896.

Jaishi Ram, for appellant.

Herbert, for respondents.

The judgment of the Court was delivered by

CLARK, J.—Plaintiff in order to succeed in his suit for pre-emption must show that he became a proprietor under the deed of 17th June 1894. 8th Novr 1898.

The first question for decision then is whether this deed is a sale, or only a contract for sale.

Both Courts have found that the deed is only a contract for sale; and after a careful consideration of the terms of the deed we think that they are right.

The words "*muahada bai*" and "*sauda farokht*," we think, refer to a contract for sale and not to a sale, and so do the words at the end "*lihaza ikrar-nama likh diya ke sanad ho*."

In para. 2 the vendor undertook to satisfy plaintiff further as to vendor's title to part of the property, and the evidence shows that it was because plaintiff was not quite satisfied with

the title that a deed of sale was not then executed. The vendor undertook to execute a deed of sale, and that if he did not within three months plaintiff might sue for specific performance.

The deed was only stamped with Re. 1 as a contract for sale, and not as a sale.

The payment of consideration does not necessarily imply that the deed was a sale: consideration might be paid for a contract to sell.

We find that the deed of 17th June 1894 was a contract for sale and not an actual sale.

It is then argued that on the principle of equity which considers that done which ought to be done, and which the Court can compel to be done, plaintiff became equitable owner of the property under the contract for sale, without obtaining any deed of sale. This appears to be the English law on the subject. Even though a person, who has contracted to sell land, becomes trustee for the intended vendee, this may be the relation established as between the parties to the contract for sale without making the intended vendee proprietor with reference to third parties.

As regards the law in India, Section 54 of the Transfer of Property Act is clear that a contract for sale of immoveable property does not, of itself, create any interest in or charge on such property.

Though this Act is not in force in the Punjab, it represents generally the law in force in India, and no decisions have been quoted which show that in the Punjab title passes under a contract to sell.

I. L. R., XI All., 244, was quoted, but we think this is against plaintiff. Mr. Justice Mahmud there says: "I regret, however, with due respect, I am unable to follow that ruling (*I. L. R.*, III All., 77), for it seems to me to proceed upon dis-regarding the distinction between a *contract of sale* and a *contract to sell*, the former being an executed contract, and the latter appertaining to the class of executory contracts, or to use the technical language of jurisprudence, sale creates a *jus in rem*, as it passes ownership immediately when it has been executed; and a contract to sell is a *jus ad rem*, for it only creates an obligation attached to the ownership of property, and does not amount to an interest therein."

Then under Section 27 (b) of the Specific Relief Act plaintiff would have had no claim to the land if the vendor had, subsequent to the contract to sell, sold the property to a third person without notice of the contract to sell, for value.

Again though under English law the intending vendee would have to bear the risk of loss to the property, under Indian Law the intending vendor would have to bear the loss (*Vide* Shepherd's Transfer of Property Act, 2nd Edition, page 386). We hold then that plaintiff did not become a proprietor under the deed of 17th June 1894 and we dismiss the appeal with costs.

Appeal dismissed.

No. 66.

Before Mr. Justice Clark and Mr. Justice Gordon Walker.

SADHU RAM AND OTHERS,—(PLAINTIFFS),—
APPELLANTS,

Versus

MUSSAMMAT BAINI BAI AND OTHERS,—
(DEFENDANTS),—RESPONDENTS.

} APPELLATE SIDE.

Case No. 787 of 1895.

Punjab Courts Act, 1884, Section 40—Questions of law involved—Burden of proof—Construction of deed—Contradictory finding by lower Appellate Court—Material irregularity.

Held, that the proper allocation of the burden of proof and the construction of a deed which merely affected the parties to the suit and concerned no one else, were not "questions of law involved in the case" within the meaning of Section 40 of the Punjab Courts Act, 1884.

No. 45, *Punjab Record*, 1894, and No. 68, *Punjab Record*, 1897, followed.

It was further contended, on behalf of appellant, that inasmuch as the Divisional Judge had held that Article 127 of the Limitation Act was applicable to the case, his subsequent finding that the property in dispute was not "joint family property" amounted to an error of law or, at least, to a material irregularity within the meaning of Section 622 of the Civil Procedure Code.

Held, that, even upon the assumption that such findings were erroneous and contradictory, they would not amount to "questions of law involved" within the said section of the Punjab Courts Act.

Held, further, that all that was decided by the Divisional Judge was that, if the allegations in the plaint were correct and the property were to be held to be "joint family property," then under these conditions Article 127 of the Limitation Act would be applicable, and that this did not amount to holding that the property was in fact "joint family property," so as to throw the burden of proving that it was not on the other side, or preclude

the Court from finding on the merits that it was not in fact "joint family property."

It not being contended that the parties were members of a joint Hindu family, and it being admitted that all the house property other than that in dispute had been partitioned though some property consisting of agricultural land was still held jointly, *held*, that the burden of proving that the property in dispute was joint family property was at the outset rightly placed on plaintiffs, and that there was nothing in the findings of the Divisional Judge as above explained which shifted the burden to the other side.

Held, therefore, that the Divisional Judge had not acted with material irregularity in dismissing plaintiffs' claim on the ground that they had failed to discharge the *onus* which rested on them.

Further appeal from the order of Captain C. S. Martindale, Divisional Judge, Mooltan Division, dated 3rd May 1895.

H. Rattigan and Lal Chand, for appellants.

Grey, for respondents.

The judgment of the Court was delivered by

10th Novr. 1898.

GORDON WALKER, J.—This is a certificate appeal and the Divisional Judge has granted the certificate on one ground only, *viz.*, "that there is a question of law involved, namely, "on whom the *onus probandi* was." It has, however, been held by the Court (*Punjab Record*, No. 45 of 1894 followed in *Punjab Record* Nos. 68 of 1897 and 41 of 1898) that the proper allocation of the burden of proof is a question incidental to the proceedings and not a question of law involved in the case within the meaning of Section 40 of the Punjab Courts Act, and we see no reason to dissent from that ruling. It is, however, argued for plaintiffs (appellants) that there are other questions of law involved in the case (the application to the Divisional Judge for a certificate did in fact set out other grounds, though the Divisional Judge selected what was certainly the wrong one), and if it were established that there are other "questions of law involved" within the meaning of Section 40, we should be prepared to hear the case as a further appeal.

The first of the other grounds taken is that the Divisional Judge has put a wrong construction on the deed of 1861, holding that it operated only as between two of the defendants and not as between the two branches of the family. The meaning of the words "question of law" was considered in the second of the two judgments quoted above (*Punjab Record*, No. 68 of 1897), and, attaching to the words the meaning that they were there held to have, we are unable to find that this

would be a "question of law" within the meaning of Section 40. The question of the construction of this particular deed is one that merely affects the parties to the suit, and cannot be held to concern any one else, or to be of general interest.

The other point taken with reference to the further appeal is that if Article 127 of the 2nd Schedule of the Limitation Act is applicable to the case as the lower Courts have held, that was equivalent to holding that the property was "joint family property." It is urged that the Divisional Judge has come to a contradictory finding when he goes on to hold that the property is not in fact joint. Here again we are unable to see, even if there were anything in the contention, that this would be a question of law within the meaning of Section 40, and, as will be noticed presently, the argument admits of an easy answer.

The second part of the case put forward for plaintiffs is that there have been material irregularities which would justify the Court interfering under Section 622, Civil Procedure Code. It is urged that the lower Appellate Court has committed a material irregularity in wrongly adjusting the burden of proof, and, as incidental to this, the argument with reference to Article 127, which has been noticed above, is put forward. It is contended that the plaintiffs have been prejudiced by these irregularities, and that the case is one in which the Court should exercise its power of revision. It is further contended (1) that the Divisional Judge has not taken notice of the other documents on the file, and (2) that even on the finding plaintiffs should have got a decree against Tula Ram, who admitted plaintiffs' claim.

The last two points may be disposed of by referring to the order of the Divisional Judge on review (dated 18th June 1895), which shows that the Divisional Judge did take into consideration the documents and the admission of Tula Ram. As regards the argument founded on Article 127, it is a sufficient answer that all that was decided in the lower Courts was this, that if the allegations in the plaint are correct and the property were to be held to be "joint family property," then under those conditions Article 127 would be applicable. That certainly does not amount to holding that the property is in fact "joint family property," so as to throw the burden of proving that it is not on the other side.

It is not contended for plaintiffs that they and defendants are members of a joint Hindu family. It is further admitted

that the house property other than that in dispute has been partitioned, while some property consisting of agricultural land is held jointly. No presumption in favour of plaintiffs could be drawn from these circumstances that the property in dispute is joint ancestral property, so as to throw the burden of proving that it is not on the defendants at the outset, therefore the burden was rightly placed on the plaintiffs. Then the Divisional Judge finds that the deed of 1861 does not prove that the property was then joint. We are not concerned with the correctness of that decision, for at most the Divisional Judge could only be held to have come to an erroneous decision on the point. On his finding there could be no question of shifting the burden to the other side. Granting, therefore, for the sake of argument, that this would be a ground for interference under Section 622, we are unable to find that the Divisional Judge has acted with material irregularity.

We hold therefore that plaintiffs must fail under Section 622 as well as under Section 40 of the Punjab Courts Act, and we reject the petition.

Application dismissed.

No. 67.

Before Mr. Justice Clark and Mr. Justice Gordon Walker.

IBRAHIM AND OTHERS,—(PLAINTIFFS),—APPELLANTS,

APPELLATE SIDE.

Versus

MUSSAMMAT FATIMA AND ANOTHER,—(DEFENDANTS),
—RESPONDENTS.

Case No. 626 of 1896.

Custom—Alienation—Gift by widow in favour of daughter married after death of widow's husband—Khanadamadi—Gujars of Gujrat—Riwaj-i-am.

In a case in which the parties were Gujars of Gujrat District, found that the right which a landowner has to make his daughter and her issue heirs in *Khanadamadi* cases cannot be extended in favour of such landowner's widow, and that the widow is not entitled by custom to gift her late husband's land to her daughter.

Further appeal from the order of A. Christie, Esquire, Additional Divisional Judge, Jhelum Division, dated 14th April 1896.

Parkash Chand, for appellants.

The judgment of the Court was delivered by

CLARK, J.

11th Novr. 1898.

Abdulla (died in 1892) married Mussammat Fatima, defendant No. 1.

Mussammat Aisha, defendant No. 2, married Karam Ilahi.

Plaintiff, a collateral of Abdulla in the fourth degree, sues for a declaration that a gift of land, dated 10th August 1895, by defendant No. 1 to defendant No. 2 shall not affect his reversionary rights.

The parties are *Gujars* of Gujrat. Mussammat Aisha was not married till after Abdulla's death, and though since her marriage Mussammat Aisha and her husband have been living with Mussammat Fatima, this does not entitle defendant to derive any advantage from the custom in favour of *khanadamad* in the Gujrat District. It is the proprietor himself and not his widow who can make his son-in-law a *khanadamad*. Defendants rely upon the custom stated in the *Riwaj-i-am*.

"The widow cannot, as a rule, alienate by deed of gift or by will the estate of her husband, unless she is advanced in years, and there is no likelihood of re-marriage. Under the latter circumstances she can transfer by gift to any male member of her husband's family, or to a descendant of her daughter under whose care she lives. The transferee will be answerable for her maintenance."

Mussammat Fatima is before us, and does not seem to be more than 40 years of age. Mussammat Aisha has no children, and the gift is to her, and not to her children.

This entry in the *Riwaj-i-am*, therefore, does not strictly apply to the case, but even if it did, we do not think it would be sufficient to prove a custom so opposed to the ordinary right of the widow. The other evidence in support of this custom is in our opinion worthless.

Captain Davies on page 3 of his Customary Law of Gujrat discusses the question, and says that such a transfer by a widow would probably require the sanction of her husband before death. He quotes *Punjab Record*, No. 43 of 1883, and No. 128 of 1884, which support this view.

It was alleged by defendant that Abdulla on his death-bed gave directions to this effect, but we do not accept this as proved.

We do not see that there is anything to warrant the extension to his widow of the right, which a landowner has, to make his daughter and her issue heir in *khanadamadi* cases.

And we do not think that a custom is proved allowing the widow to gift her husband's land to her daughter. The general custom and the exceptions are given under para. 64 of Rattigan's

Digest. The exceptions are generally among tribes influenced by Muhammadan law—*Sayads*, and *Pathans* and *Kakezais*.

We accept the appeal, and decree declaring that the gift of 10th August 1895 shall not affect plaintiffs' reversionary right after the death of defendant No. 1, and costs throughout.

Appeal allowed.

No. 68.

Before Mr. Justice Clark and Mr. Justice Gordon Walker.

RUKAN DIN, MINOR, THROUGH GHULAM, AND
OTHERS,—(DEFENDANTS),—APPELLANTS,

APPELLATE SIDE {

Versus

MUSSAMMAT MARIAM AND OTHERS,—(PLAINTIFFS),—
RESPONDENTS.

Case No. 652 of 1896.

Custom—Succession to childless proprietor—Exclusion of near collaterals by proprietors of village—Village founded within boundaries of old village—Right of collaterals residing in latter to succeed to land in former—Succession of adopted son in his natural family—Riwaj-i-am.

In the present case it appeared that *mauza* Ferozabad had been founded by the grandfather of the two deceased proprietors, the succession to whose lands was in dispute, within the boundaries of *mauza* Rania. The two proprietors having died childless, the proprietors of *mauza* Ferozabad claimed to exclude the near collaterals who lived in *mauza* Rania, and based their claim on an entry in the *Wajib-ul-ars* to the effect that on the death of a landowner without issue his near collateral should succeed provided he lived in the same *patti*; otherwise the landowners of that *patti* should succeed. There was no such entry in the *Wajib-ul-ars* of *mauza* Ferozabad, but it was contended that the entry in question applied equally to that village inasmuch as it had been founded from the other.

Held, that the said entry was very unusual and not very reasonable, and should not, therefore, be extended to *mauza* Ferozabad so as to give the proprietors of that village a preferential right over the near collaterals.

Held, further, that the decision of the Court in No. 64, *Punjab Record*, 1893, did not apply to the present case, inasmuch as the founder of *mauza* Ferozabad did not go and acquire land in a remote village but merely assisted in founding a new village within the boundaries of his old village, and also because the collaterals, as descendants of the founder, were claiming property which, so far as they were concerned, was ancestral property.

Held also, as regards the conflicting claims of the collaterals *inter se*, that an adopted son and his descendants are entitled to succeed in the natural family of such adopted son.

*Further appeal from the order of Sardar Gurdial Singh, Man,
Divisional Judge, Ferozepore Division, dated 9th April 1896.*

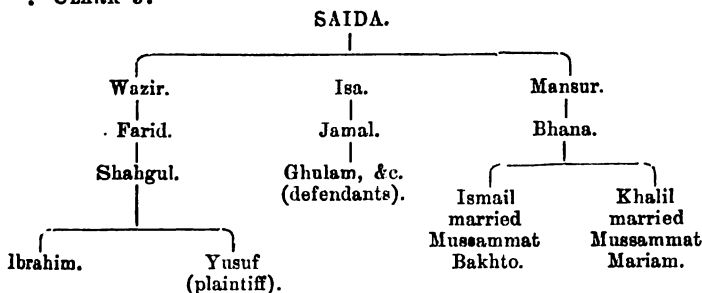
Oertel, for appellants.

Golak Nath, Krishen Singh and Lajpat Rai, for respondents.

The facts of the case sufficiently appear from the judgment of the Court delivered by

. CLARK J.

25th Novr. 1898.



The properties of Ismail and Khalil were held by their respective widows. Ismail's widow, Mussammat Bakhto, recently died, and the property was mutated in the name of Mussammat Mariam, widow of Khalil: thereupon the descendants of Wazir brought a suit for possession of the estate against Mussammat Mariam and the sons of Jamal, for possession of the property held by Mussammat Bakhto.

The sons of Jamal stated that they excluded the sons of Wazir, alleging that Jamal was the son of Mansur.

While this suit was pending the proprietors of *mauza* Ferozabad instituted a suit against all those parties for a declaratory decree that they, on the death of Mussammat Mariam, were entitled to succeed to the whole of the estate of Bhana.

The first Court dismissed the claim of the proprietors and held Jamal was the son of Mansur, and that Jamal's sons excluded the descendants of Wazir, and dismissed the suit of the descendants of Wazir.

The Divisional Judge held the right of the proprietors established and decreed their claim. Though he held that Jamal was the son of Isa and not of Mansur, yet he dismissed the appeal of the descendants of Wazir, apparently weighing their claims with those of the proprietors, who were not as a matter of fact parties to their suit.

We will first discuss the claim of the proprietors. The estate is situated in *mausa* Ferozabad, which was founded out of *mausa* Rania. In the *Wajib-ul-ars* of Rania there is an entry that if a landowner dies without issue then his near collateral shall succeed, provided he lives in the same *patti*, but if he does not live in that *patti*, that the other landowners of that *patti* shall succeed. There is no such entry in the *Wajib-ul-ars* of Ferozabad, but the proprietors urge that the entry of Rania should be applied to Ferozabad, as the one is founded from the other. We are unable to accept this contention. The proviso of the Rania *Wajib-ul-ars* is a very unusual one, and apparently not a very reasonable one. There is no apparent reason why living in a different *patti* of the same village should exclude a near collateral. This entry may have been due to some peculiar circumstances of Rania, such as feuds between the different *pattis*. There are no *pattis* in Ferozabad, and it seems to have been founded by a body of near relatives.

We therefore think that there is no special agreement applicable to Ferozabad which would give a preferential right to the proprietors over the near collaterals.

The Divisional Judge has further held, following *Punjab Record*, No. 64 of 1893, that the collaterals cannot succeed to a collateral in a different village.

This case is very different from that case. *Mansur* did not go and acquire land in a remote village; he only assisted in founding a new village within the boundaries of his old village.

Another essential difference is that, as we shall show directly, the sons of Jamal are descendants of Mansur, who acquired the property, and what they are claiming is therefore ancestral property as far as they are concerned.

We hold therefore that the proprietors failed to establish their claim to this property.

The next question is the competing rights of the sons of Jamal and those of the descendants of Wazir. These depend on the question whether Jamal was the son of Mansur.

We think that Jamal was the natural son of Bhana and was adopted by Isa. Even the witnesses for Wazir's descendants say that Jamal was only the adopted son of Isa.

An inspection of the *kursinama* of the 1856 Settlement strongly supports this view: we think that Jamal is there

intended to be shown as the son of Bhana, and that Isa is probably put in between in a small circle to allude to the adoption.

The rulings of this Court are to the effect that an adopted son succeeds in his natural family.

The sons of Jamal therefore entirely exclude the descendants of Wazir, and the suit brought by the descendants of Wazir must be dismissed.

This appeal is accepted, and the suit of the proprietors is dismissed with costs throughout.

Appeal allowed.

No. 69.

Before Mr. Justice Clark and Mr. Justice Gordon Walker.

MUGHAL,—(PLAINTIFF),—APPELLANT,

Versus

JALAL AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

} APPELLATE SIDE.

Case No. 466 of 1896.

Pre-emption—Sale to two co-sharers and a stranger—Subsequent acquisition of stranger's share by third co-sharer—Suit by a fourth co-sharer for pre-emption.

The land in suit was in the first instance sold to three persons, of whom two were co-sharers in the joint holding but one was not. Subsequently plaintiff, who was also a co-sharer in the said holding, sued for pre-emption in respect of the sale, but shortly before the institution of his suit, the stranger vendee sold his share to one K. C., another co-sharer in the same holding. Accordingly at the time when the suit was instituted, the land was in the hands of three vendees against no one of whom plaintiff could assert a superior right. It was, however, contended on behalf of plaintiff that regard must be had to the original transaction in which two vendees, who had equal rights with plaintiff, had joined with them in the purchase a third whose right was inferior to that of plaintiff, and that the right of pre-emption which plaintiff would in consequence have had as against the original vendees could not be defeated by the subsequent elimination of the stranger and the substitution of a person against whom plaintiff had not a superior right.

Held, overruling the said contention, that the mere fact that at one stage a stranger had a share in the bargain could not be held to vitiate the right of the three persons who were the vendees at the date of suit and resisted plaintiff's claim with one that was not inferior to his own.

Further appeal from the order of D. C. Johnstone, Esquire, Divisional Judge, Jhelum Division, dated 1st April 1896.

Lal Chand, for appellant.

K. P. Roy and Ishwar Das, for respondents.

15th Novr. 1898.

The judgment of the Court was delivered by

GORDON WALKER, J.—The land in suit was in the first instance sold to three persons (1) Sainditta, (2) Sahibditta and (3) Devi Dial for Rs. 1,500. Of these (1) and (3) were already co-sharers in the joint holding, but (2) was not, so that if this suit were one brought by plaintiff to enforce his right of pre-emption as a co-sharer in the holding, against the three original vendees he would necessarily have succeeded, because the right of one of them was inferior to his. But before the institution of plaintiff's suit Sahibditta had transferred by sale his share of the bargain to one Karam Chand, who was also a co-sharer in the holding, and to whom plaintiff has no superior right. Thus when the suit was instituted the land was in the hands of three vendees against no one of whom plaintiff can assert a superior right. So far there is no dispute. (1) It is argued in the first place for plaintiff that we must look to the original transaction, in which two vendees, who had equal rights with the plaintiff, joined with them in the purchase a third whose right was inferior to that of plaintiff, and that the right of plaintiff could not be defeated by the subsequent elimination of the stranger and the substitution of a person against whom plaintiff had not a superior right. (2) It is further argued that having regard to the details of the transfer by Sahibditta to Karam Chand this was not a *bona fide* transaction, and we are referred to the remarks made by Mr. Justice Rivaz, in the judgment published as a foot-note to *Punjab Record*, No. 30 of 1893, beginning with "Before dealing with this question, &c." As regards this second point, it may be observed that the deed of sale by which Karam Chand took the place of Sahibditta was executed two days before the institution of plaintiff's suit, and it might perhaps be inferred from this that the transfer was made while the suit was being threatened and in view of its institution. But plaintiff did not in either of the lower Courts directly attack the genuineness of the transaction, the question was never put in issue, and it cannot be said to be raised in the grounds of appeal either to the Divisional Judge or to this Court. We do not therefore think that it is open to us to go into it now.

It may be taken, then, that this transaction (the sale by Sahibditta to Karam Chand) was a genuine one, and, that being so, Karam Chand may be held to have acquired the share of Sahibditta by coming forward and asserting his superior right of pre-emption. He might no doubt have asserted his

right to take over the whole bargain on the ground that the other two vendees could not oppose him because they had associated Sahibditta, a stranger, with themselves. He was content, however, to take only Sahibditta's share of the bargain, leaving the other two undisturbed.

The present case is clearly distinguishable from that in *Punjab Record*, No. 106 of 1880. There the sub-purchaser took only part of the bargain, but *left the rest with an original purchaser whose right was inferior to that of the person claiming pre-emption.*

In that case the learned Judge remarked that the sub-purchaser "must be held to be estopped from asserting the right he has once waived of acquiring the property solely against another person whose claim to pre-emption, though inferior to his own, is still superior to that of the first purchaser." In that case the right of the sub-purchaser was held to be vitiated because he had *allowed another person who had a right inferior to plaintiff's to retain part of the bargain.* We think that this judgment taken with *Punjab Record*, No. 10 of 1884, goes no further than to establish this principle that, when a right of pre-emption is claimed against several purchasers, the measure of their rights is to be taken to be that of the purchaser who has the lowest right, so that, if a claimant can show a right superior to that of any one of several joint-purchasers, he must succeed. In *Punjab Record*, No. 138 of 1884, another principle was established that, where a purchaser has acknowledged privately the right of a person to pre-emption of his purchase and has transferred it to him, a third person not having a superior right to the sub-purchaser (although his right is superior to that of the original vendee) cannot succeed against the sub-purchaser. It is clear that the remarks of Mr. J. Powell in that judgment with reference to *Punjab Record*, No. 106 of 1880, concern only the view of the case expressed above, *viz.*, that the sub-purchaser had vitiated his right by allowing a person *with claims inferior to the plaintiff to remain associated with him in the bargain.*

The question that really arises in the present case has not apparently yet been decided by this Court directly in any other so far as we are aware. The Divisional Judge has decided it on the analogy of *Punjab Record*, No. 138 of 1884, extending the principle therein laid down to it. The question which we have to decide under this head of the case may be stated to be as follows:—The sub-purchaser (Karam Chand) had admittedly a good claim against the three original purchasers,

because one of them had a right inferior to his. He did not enforce it against them all three by taking over the whole bargain, but contented himself with taking over a share and allowing the two original purchasers as against whom plaintiff has not got a superior right to remain in. There was a flaw in the right of the three original purchasers, has that been mended by the transfer of the stranger's part of the bargain to the sub-purchaser? We think that the answer must be in the affirmative. If Sainditta, Devi Dial and Karam Chand had been the original purchasers, plaintiff would have no claim against them, and it is equally true, we think, that if Karam Chand had taken over the whole bargain and re-transferred two-thirds of it to Sainditta and Devi Dial, plaintiff would in that case also have failed. The fact that at one stage a stranger had a share in the bargain cannot, in our opinion, be held to vitiate the right of the three persons who are now vendees, and resist plaintiff's claim with one that is not inferior to his. It cannot be properly contended that Karam Chand merely took the position of the stranger in the bargain and can claim no better right than that derived from him. The position that he took was in virtue of his right as a pre-emptor to whose superior right the stranger had yielded. Nor is there any force in the contention that the two original vendees who remained in waived their right as against the plaintiff by having admitted a stranger. No doubt plaintiff obtained a cause of action against the three original vendees on the first sale, but the same may be said where there is a sale to a single stranger vendee who subsequently transfers to a person having an equal right with the plaintiff. To admit the argument which it is sought to found on that would be to strike at the root of the principle on which the decisions of this Court are founded. On this point *I. L. R.*, XX All., page 101, in which the Allahabad High Court has accepted the same view as this Court, may be referred to. It is true that in *Punjab Record*, No. 94 of 1895, the learned Judge (page 451) speaks of a sale where strangers have joined as being "bad in its entirety against plaintiff." But that case also is distinguishable from the present one by the fact that the strangers were allowed to remain in. We hold that the right of the three defendants was not injured by the failure of Karam Chand to impeach the sale so far as the two remaining original purchasers were concerned, and that they did lose their right by the association of a stranger with them in the original bargain.

In this view of the question, *Punjab Record*, No. 94 of 1895, has no bearing on the matter, nor is it necessary to discuss the other points raised except that taken in the fourth ground of appeal to the Divisional Judge (which is covered by the sixth ground of appeal to this Court). The question of custom (fifth ground in appeal to Divisional Judge) was not referred to in the arguments before us. The other point, *viz.*, the right of plaintiff to share in the bargain (*Punjab Record*, No. 54 of 1882) as having equal rights with the vendees, was not taken in the first Court and was apparently not pressed before the Divisional Judge. The ruling quoted is totally inapplicable to the present case. It was there held that *in the circumstances of that case* "the right of pre-emption was a joint right of the plaintiff and the purchaser, and by buying a share he has exercised their rights as well as his own." It cannot be seriously argued that there was any community of interests between the plaintiff in this case and the vendees, or generally that a purchaser must be held to take on behalf of all persons who have an equal right of pre-emption (with him) in the property. See *Punjab Record*, No. 17 of 1884, on this point.

For these reasons we think that the appeal must fail, and we dismiss it with costs.

Appeal dismissed.

No. 70.

Before Mr. Justice Clark and Mr. Justice Gordon Walker.

UMAR BAKHSH,—(PLAINTIFF),—APPELLANT,

Versus

ABDUL KABIM AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

} APPELLATE SIDE.

Case No. 491 of 1896.

Pre-emption—Claim in respect of land situate in out-growth of town of Batala and occupied by shops—Onus probandi.

Plaintiff sued for pre-emption of certain land which, though formerly agricultural, was at the date of suit situate in an out-growth of the town of Batala, and was occupied by business premises, or shops, and not by dwelling-houses.

Held, that the claim must be treated as one in respect of property which, though formerly agricultural land, should now be regarded as subject to urban rules.

Held, therefore, that the burden of proving that there was a custom of pre-emption applicable to such property was upon plaintiff, and *found*, that plaintiff had failed to relieve himself of such *onus*.

No. 87, *Punjab Record*, 1890, *followed*.

Further appeal from the order of J. A. Anderson, Esquire, Divisional Judge, Amritsar Division, dated 23rd March 1896.

K. P. Roy, for appellant.

Lal Chand, for respondents.

The judgment of the Court was delivered by

2nd Decr. 1898.

GORDON WALKER, J.—The property which is the subject of this suit is situated just outside the town of Batala, beyond the original limits of the town which are defined by the circular road. The town is gradually spreading out, and land which has formerly been cultivated is being taken up for building sites, mostly for shops and business premises (*kar-khanas*). This is clearly what has happened in respect of the land in dispute. It has been built over; and the first question for consideration is whether, for the purposes of this suit, we are to regard the land as subject to the rules of pre-emption which apply to urban areas or as agricultural land. The same question arose in the case in which the judgment is reported as *Punjab Record*, 87 of 1890, the site in dispute there being portion of another out-growth of Batala. In that case Mr. Justice Benton observed “it appears to us that we ought to regard the “property as situated in a town, it being a suburb in immediate proximity to a large town and occupied by shops, a grain market and such like buildings used for commercial purposes, etc., etc.” We have no hesitation in accepting the view expressed by the learned Judges in that case, and in holding that plaintiff’s claim is to be dealt with in accordance with the rules applicable to urban areas.

That being so, it remains to consider whether plaintiff has established the existence of a custom of pre-emption applicable to the site in dispute: granting as we may, at least for the sake of argument, that there may be a well-established custom of pre-emption applicable to sites within the original limits of the town, can it be deduced from this that the same custom would apply to the areas under out-growths of the town, or has plaintiff otherwise proved the existence of a custom that would so apply? We think that the reply to both questions must be in the negative.

The right of pre-emption is an interference with the rights of property which is justified by certain considerations. In the case of village lands its object may be taken to be the exclusion of strangers, and the maintenance of the village community in its integrity. Here the considerations are regarded

as of such force that the custom is presumed to exist. In the case of sites in towns there is no such presumption; but it is recognized that there may be circumstances which would justify the interference in respect of them also, and it is open to the party claiming pre-emption to prove the existence of a custom.

There is one point of importance in this case that does not seem to have been brought out with sufficient clearness. The first Court has found, and it is clearly right here, that "the site in suit is on the new *abadi* formed outside the town "of Batala for the purpose of starting workshops. . . . These "houses have been built for the manufacture of iron *belnas* " (sugarcane presses)." Also "the site in dispute is a new *abadi* formed for the purposes of trade in iron *belnas* (sugarcane presses)." It is clear that what we are dealing with are not dwelling-houses, but business premises, in fact *shops* not *houses*.

As regards the rulings of this Court which have been quoted in the arguments, *Punjab Record*, No. 87 of 1890, has already been referred to. That ruling is very much in point. It was held that the plaintiffs had in that case failed to establish a custom of pre-emption in the *Tahsilwala bazar*, another out-growth of Batala. It does not appear to us to constitute a material difference between the two cases that the *Tahsilwala bazar* was a little way off from the original town, while the area in dispute is only separated from the town by the circular road. No. 17 of 1889 was a case relating to *houses* inside the town of Batala; but the only question really involved was as to which of two claimants, owners of adjoining houses, had the superior right. The right of pre-emption founded on vicinage as regards *houses in the town* was apparently not disputed.

Punjab Record No. 49 of 1889 was also referred to; but it has really no bearing on the present case.

Punjab Record, No. 103 of 1889. This case is on the face of it easily distinguishable from that now before us; but there are some portions of the judgment that may be quoted as showing the principles on which the decision in such a case should be based. "It cannot be doubted," remarked Mr. Justice Powell, "that the object and purpose for which the right of "pre-emption was recognized and enacted in Act IV of 1872 was "to protect the compactness of village communities, and in "*towns* to respect native feeling as regards caste exclusiveness

“the seclusion of private family life and so forth; not to interfere with private rights of contract or the disposal of property. It has not, however, been so limited in the Act that the right can only be exercised when some consideration connected with caste seclusion, re-union of divided tenements, or convenience regarding privacy is established.” Elsewhere in the same judgment the following passage occurs:— “We do not wish to lay too much stress on the fact of plaintiff’s premises being mere *shops*, but it is indisputable that it does not follow that because in a sub-division pre-emption is the custom in parts occupied by dwelling-houses, therefore it holds good for those occupied by shops

Punjab Record, No. 170 of 1889, related to a site in *Mohalla Sultan Ganj*, a suburb of *Mooltan*. In the judgment in that case it was observed: “It is admitted that it (the custom of ‘pre-emption’) prevails generally within the city of *Mooltan* and that, as a general rule, where pre-emption is found to prevail within some sub-divisions of a city it may be presumed, unless the contrary is shown to prevail in others also. But it is contended that this applies only to the city proper, and that where a suburb has grown up as it were independently and is not a mere growth of the city itself, those who assert that pre-emption exists in it must prove their assertion. The view appears to be generally correct and to be applicable to the present case.” (Roe, J.) These facts are no doubt distinguishable from those of the present case where the site in dispute may be said to be “a mere growth” of the town of *Batala*. But it is not to be inferred that the learned Judge meant to convey that, if the suburb had been “a mere growth” the presumption would have been in favour of the existence of a right of pre-emption. It would no doubt be easier to prove the existence of the custom in a “mere growth” than in an “independent” suburb; but distinct proof would be necessary in the former case also.

Punjab Record, No. 199 of 1889 may be taken as showing that the customs of pre-emption as regards houses prevails in the town of *Batala*.

In *Punjab Record*, No. 17 of 1895, the distinction between claims in respect of shops and in respect of dwelling-houses is emphasized. This was held to have “a substantial foundation in the social usages of the country, such as privacy of women and compactness of family or tribal residences, exclusion of out-

“siders, convenience of neighbours and the like, which underlie the custom, and has been clearly accentuated in the recent decisions of this Court. The character and uses of the two classes of property are totally different, and evidence of the right existing in respect of houses may be relevant, but is very feeble evidence of its application to shops. We concur with the later authorities of this Court that it is not sufficient for a plaintiff to show that the right extends to a house in a particular portion of a town, and that *it must be affirmatively shown to extend to shops, &c.*”

As regards the unreported case No. 522 of 1879, quoted by the lower Appellate Court, it cannot be said that this helps plaintiff much. The decision in that case proceeded on other grounds, and the questions which arise in the case now before us were not directly raised, if, indeed (see Mr. Justice Brandreth's judgment), the defendants did not actually admit the existence of a custom founded on vicinage.

The first Court held that the plaintiff had a superior right to the defendant-vendee, because in a previous suit the latter succeeded in establishing his right of pre-emption in another plot on the grounds on which plaintiff now claim; but in that case also the decision proceeded on different grounds, the questions that we have to decide here not being raised.

The conclusion at which we arrive in the present case is that the claim is to be treated as one in respect of property which, though formerly agricultural land, must now be regarded as subject to urban rules. It was for plaintiff to prove that, the land being situated in an out-growth of the town of Batala, and being occupied by business premises or shops and not by dwelling-houses, there was a custom of pre-emption applicable to such property. We think that he has failed to establish this, and that his suit was rightly dismissed by the Divisional Judge.

This appeal is accordingly dismissed with costs.

No. 71.

Before Mr. Justice Clark and Mr. Justice Gordon Walker.

APPELLATE SIDE. {
 DEVI DITTA AND OTHERS,—(DEFENDANTS),—
 APPELLANTS,
Versus
 PAREMAN AND OTHERS,—(PLAINTIFFS),—
 RESPONDENTS.

Case No. 814 of 1896.

Suit to contest validity of sale—Right of plaintiffs to attack mortgage made in favour of vendee more than 12 years before suit—Merger of mortgage in sale—Limitation Act, 1877.

In a suit in which plaintiff prayed for a declaration that a certain sale of land would not affect his reversionary rights, and it appeared that the said land had been mortgaged to the subsequent vendee more than 12 years before suit,

Held, that there was nothing in the provisions of the Indian Limitation Act of 1877 which prevented the plaintiff in such suit from attacking the said previous mortgage, and that it could not be held in a suit regarding the subsequent sale, that the title of the mortgagee had acquired validity by prescription.

But *held*, that there was a presumption, which had not been rebutted, that the mortgagee intended to keep alive the charge created by the previous mortgage-deed, and that it was not merged in the subsequent sale.

Held, therefore, that plaintiff was entitled to a declaration that the sale would not affect his reversionary rights, but that such declaration could not affect the rights of the mortgagee under the previous mortgage.

Further appeal from the order of Khan Muhammad Hayat Khan, O. S. I., Divisional Judge, Jullundur Division, dated 8th June 1895.

Jaishi Ram, for appellants.

The facts of the case sufficiently appear from the judgment of the Court delivered by

9th Decr. 1898.

GORDON WALKER, J.—The material facts of the case are the following. Raj Mal mortgaged the land in suit with possession to defendants for Rs. 100. After his death, his widow, Mussammat Jassi (defendant 1) on 7th March 1878 executed a bond in favour of defendants for Rs. 200, the money being required, it was stated, for the funeral expenses of her husband, and for her own subsistence. On 3rd December 1880 Mussammat Jassi mortgaged the land to defendants for Rs. 460, the consideration being made up of the Rs. 300 above and Rs. 160 interest. Finally on 10th April 1894 Mussammat Jassi sold the land verbally for Rs. 559, which included the Rs. 460

above, and another item of Rs. 99. Plaintiffs sue for a declaration that this sale shall not affect their rights as reversionary heirs of Raj Mal.

The first Court held that the sale of 1894 was fictitious, and declared it void as against plaintiffs. But with regard to the mortgage for Rs. 460, executed in 1880, it held that "though it had not been proved that the sum of Rs. 460 was raised for necessity, yet as the said deed was executed in 1880, and as plaintiffs did not bring a suit for cancellation thereof within the period of 12 years they cannot now raise an objection as to the validity of the said deed." A decree was accordingly passed which maintained the mortgage of 1880 as against plaintiffs.

On appeal by plaintiffs the Divisional Judge held that the suit was barred by limitation as regards the mortgage deed of 1880, and he dismissed the appeal on this ground. An application for revision (Section 622) was made to this Court, and Mr. Justice Stogdon in his order, dated 18th February 1896, remarked that plaintiffs' suit was with regard to the sale of 1894, plaintiffs not asking for any relief in respect of the mortgage of 1880, and that the Divisional Judge had neither discussed nor shown why the suit as laid should be barred by limitation. The case was remanded to the Divisional Judge for re-decision of the appeal.

The Divisional Judge has, in the judgment now appealed against, misunderstood Mr. Justice Stogdon's order, taking it to amount to a decision that the suit was not barred by time as regards the mortgage of 1880. Going into that mortgage, he then found that no necessity was proved for the alienation beyond the original Rs. 100, and he has accordingly reduced the charge on the land as against the reversioners to Rs. 100.

In the present appeal defendants ask that the order of the first Court should be restored, abandoning the sale of 1894, and falling back on the mortgage of 1880. With regard to the latter it is argued that it could not be called in question because 12 years had elapsed between its execution and the suit.

We think that the view of the law taken by the first Court *as stated above* is erroneous, and that in the present suit, which is in respect of the sale executed in 1894, it would be open to the plaintiffs, *so far as the question of limitation is concerned*, and without reference to other questions, to attack the mortgage of 1880, the consideration of which was included in that of the sale. On this point we are disposed to accept the

principle laid down by Mr. Justice Chatterji in his judgment in a case recently decided by this Court (*Punjab Record*, 55 of 1897). In that judgment the leading authorities were reviewed, and it was observed that "the law of limitation has for its "immediate subject judicial remedies only." It is further pointed out that Sections 5—25 of the Act deal with rules of limitation only, while Sections 26—28 deal with the acquisition or extinction of rights owing to the lapse of time. Further on the learned Judge observes:—"I should be disposed to hold "that none of the articles in the first division of the 2nd "Schedule of the Act, except those to which Section 28 can be "applied, has an extinctive operation on primary rights, i. e., "has any other effect than that of merely barring the judicial "remedy."

We think that this principle is applicable to the question now being considered, and that there is nothing in *the provisions of the Limitation Act* which prevents the plaintiffs in the present suit from attacking the mortgage of 1880. It cannot in short be held (as the First Court did apparently hold) that in a suit regarding the subsequent sale the title of the defendants-mortgagees under the mortgage of 1880 has acquired validity by prescription under the Limitation Act.

But there is another view of the case that is put forward. It is argued that what was sold in 1894 was only the equity of redemption; and that, even if the sale be declared invalid as against the plaintiffs, the mortgage of 1880 will remain and cannot now be assailed by them.

The question that arises here is that of the merger of the mortgage charge of 1880 in the subsequent sale of 1894. The weight of authority on this point seems to be entirely in favour of the contention of defendant-mortgagees that the prior mortgage charge was kept alive. We may refer to *I. L. R.*, X *Calc.*, 1035, *XVI Calc.*, page 523, *XI Mad.*, page 345, and the question is fully discussed, special mention being made of the difference between the English and the Indian Law, in Ghose on the *Law of Mortgage in India* (Tagore Law Lectures), 2nd Edition (1889), Chapter XII, page 369, and in Macpherson, 7th Edition, pages 314-9. In *Punjab Record*, 38 of 1894, the question was between a second mortgagee and a third mortgagee, the latter having discharged, according to the stipulation in his deed, a first mortgage charge; but according to the authorities cited above, the same principle would apply to the present case, which is one of a mortgagee subsequently purchas-

ing. In the decision last quoted Mr. Justice Rivaz observed, referring to the decision of the Privy Council in *Gokal Das Gopal Das v. Puran Mul* (I. L. R., X Cal., 1035), a ruling that has also been quoted above, "it was held that as he (a subsequent purchaser) had a right to extinguish the prior charge, or to keep it alive, the question was what intention was to be ascribed to him, and that in the absence of evidence to the contrary, the presumption was that he intended to keep it alive for his own benefit. Applying that principle to the present case, we think that the presumption must be that Ghanaya (the purchaser) when he paid off Gainda Rai's mortgage, intended to keep alive the prior charge for his own benefit, and this presumption is strengthened by the terms of the deed in Ghanaya's favour, and in nowise rebutted."

Applying this principle to the present case we hold that there is a presumption, which has not been rebutted, that defendants intended to keep alive the charge created by the mortgage deed of 1880, and that it was not merged in the sale of 1894. This suit is for a declaration in respect of the sale of 1894, and plaintiffs have succeeded in respect of that, the decision on this point not being questioned on appeal to us. Plaintiffs are entitled to a decree in respect of the sale, declaring that it shall not affect their rights as reversioners: but this will not and cannot affect the rights of the defendants-mortgagees under the mortgage of 1880.

On the merits, too, as regards the mortgage of 1880, we are unable to agree with the Divisional Judge. Raj Mal mortgaged the land in his life-time, with possession of mortgagees, to the defendants-mortgagees. Presumably, therefore, he was in debt, and there was justification, in necessity, for the widow raising the subsequent loan of Rs. 200 for the purposes recited—Raj Mal's funeral expenses and her own subsistence. The defendants-mortgagees were justified in advancing her the money, and this, with the interest, was a legitimate charge on the property.

The result of our decision will be in effect to restore the decree of the first Court.

We accept the appeal, and set aside the order of the Divisional Judge. Plaintiffs' appeal to the Divisional Judge will stand dismissed, and the decree of the first Court be restored. Defendants 2—7 will get their costs in this Court and in that of the Divisional Judge.

Appeal allowed.

No. 72.

Before Mr. Justice Clark and Mr. Justice Gordon Walker.

APPELLATE SIDE

JAGAN NATH, MINOR, THROUGH MUSSAMMAT LAL DEVI, AND ANOTHER,—(PLAINTIFFS),—APPELLANTS,

Versus

TULSI DAS AND ANOTHER,—(DEFENDANTS),—RESPONDENTS.

Case No. 640 of 1896.

Hindu law—Liability of son for father's debt—Onus of proving that debt was incurred for immoral purposes—Minor son—"Antecedent debt," meaning of.

There being no reason why a minor son should not just as much as an adult son be under a pious obligation to discharge his father's debts, the *onus* of proving that a father's debts were immoral, when it is sought to set aside an alienation by the father, lies no less upon minor sons than upon adult sons, the former being in no better position than the latter.

In 1892 one G. C. mortgaged six houses to one T. D. for Rs. 5,500 by two deeds, and out of the consideration Rs. 3,000 was for the payment of an antecedent debt and Rs. 2,500 was taken by G. C. in cash. G. C. then rented the houses from T. D. and executed leases to him. In 1894 T. D. brought two suits against G. C. for possession of the houses and obtained two decrees for possession with costs in the two cases amounting, respectively, to Rs. 329 and Rs. 327. On the 24th August 1895 T. D. executed the decrees for costs and attached the six houses, and further prayed that a sum of about Rs. 7,000 which was due to him under the mortgage-deed should be reserved and the houses sold, the proceeds being applied towards the satisfaction of the sums due on the decrees. The minor son of G. C. objected to the attachment, but his objection was dismissed. He accordingly filed the present suit on the 20th February 1896 for release of the houses from attachment, and it was contended on his behalf that G. C.'s debts were incurred for immoral purposes, and that the *onus* of proving that they were not so rested in this case upon T. D. because (a) the son was a minor, and (b) Rs. 2,500 of the original debt having been taken in cash by G. C. at the time of mortgage was not an antecedent debt.

Held, that the minority of the son was no reason why the burden of proof should be shifted from him.

Held, further, that inasmuch as there were decrees for Rs. 329 and Rs. 327 against G. C. at the time when plaintiff instituted the present suit, such decrees were antecedent debts which plaintiff was under a pious obligation to pay unless he could prove that they bore an immoral taint.

"Antecedent debt" means with regard to a mortgage a "debt antecedent to the transaction," and in the case of a proceeding by suit a "debt antecedent to the suit."

I. L. R., XX Calc., 328, followed.

As regards the contention that though the amounts of the decrees might be antecedent debts, yet that this did not apply to the whole of the mortgage-money due on the mortgages, *held*, that inasmuch as the decrees

for possession and the order in execution for sale of the houses subject to T. D.'s mortgages substantially charged the whole mortgage-money on the property, plaintiff in suing to set aside orders passed against him in furtherance of T. D.'s remedy for his debt, was attempting to set up his right against the creditor's remedy for his debt, which on the authority of *I. L. R., XIII Calc.*, 21, he could not be allowed to do.

Found, on the evidence, that plaintiff had failed to prove that the debts of G. C. were for immoral purposes.

First appeal from the order of Rai Mul Raj, District Judge, Lahore District, dated 7th May 1896.

Jaishi Ram, for appellants.

Lal Chand, for respondents.

The judgment of the Court was delivered by

CLARK, J.—In 1892 Gyan Chand mortgaged six houses to Tulsi Das for Rs. 5,500 by two deeds. Out of the consideration Rs. 3,000 went to pay an antecedent debt to Narain Singh, and Rs. 2,500 was taken in cash. 3rd Decr. 1898.

Gyan Chand then rented the houses from Tulsi Das and executed leases to him.

In 1894 Tulsi Das brought two suits against Gyan Chand for possession of the houses and got two decrees for possession with costs in the two cases amounting, respectively, to Rs. 329 and Rs. 327.

On 24th August 1895 Tulsi Das executed the decrees for costs and attached the six houses; he further prayed that the sum of about Rs. 7,000 which was due to him under the mortgage-deeds should be reserved and the houses sold and the proceeds be applied towards the satisfaction of the sums due on the decrees. The Court passed orders that this should be done under Section 295 (b), Civil Procedure Code.

Jagan Nath, minor son of Gyan Chand, and Mussammat Lal Devi objected to the attachment. Their objection was dismissed on 5th December 1895. They filed this suit on 20th February 1896, for release of the houses from attachment, Jagan Nath alleging that the debts were incurred for immoral purposes and Mussammat Lal Devi that she had a right of residence in and maintenance against the houses, and that they could not be attached in Gyan Chand's decree.

The District Judge held that plaintiffs had failed to prove that the debt was incurred for immoral purposes, that the purchasers of the property would, it appeared to him, take it subject to the wife's rights of maintenance and residence if there were no other property. He dismissed the suit.

Plaintiffs have appealed to this Court; their pleader has abandoned his appeal as far as it concerns the rights of the wife, as he is content with the judgment of the First Court as far as her right is concerned, so this appeal only deals with the rights of Gyan Chand's minor son, Jagan Nath.

It is not denied generally that if a son seeks to escape from having his interest in property alienated by his father sold, it rests upon him to show that the debt was incurred for immoral purposes; but it is argued that there are two reasons why the *onus* in this case should not be thrown upon plaintiff:—

- (1) Because he is a minor.
- (2) Because Rs. 2,500 of the original debt was not antecedent debt, but was taken, by Gyan Chand in cash at the time of the mortgage.

As regards the first point. There is no reason why a minor son should not just as much as an adult son be under a pious obligation to discharge his father's debts.

We have consulted a vast number of cases of a similar nature to the present, and in none of them was it advanced that a minor son was as regards *onus* in a different position from an adult son. In many of these cases the sons were minors and the *onus* of proving immoral taint of debt was thrown upon them, *e. g.*, *I, L, R.*, XX *Cal.*, 328, and *XIII All.*, 216, Bhattacharji's *Commentaries on Hindu Law*, page 230, "says: With regard to the management of the family estate the "powers of the father who has infant sons cannot be less than "those of one whose sons are adults,"

In fact the converse of this proposition has been held: the Bengal Court has held that though such an alienation binds the minor it cannot bind adults without their consent, express or implied (*vide* Mayne's *Hindu Law*, 5th Edition, para. 286).

The question of *onus* is discussed on page 138 of Tagore *Law Lectures* of 1895-96, and it is stated that it is settled by a long course of decisions that the sons have to show that the debts were of an immoral nature, and in the absence of any evidence on the point the debt must be presumed to be of a character binding on the heirs; there is no limitation mentioned as regards minor sons.

We hold, therefore, that as regards the *onus* of proving that a father's debts were immoral when seeking to set aside an alienation by the father, the minor sons are in no better position than the adult sons, and the *onus* lies upon them.

As regards the next point, that Rs. 2,500 out of Rs. 5,500 was not an antecedent debt and that the *onus* lies upon Tulsī Das to prove that it was taken for legal necessity.

The meaning of "antecedent debt" is discussed on page 142, Tagore *Law Lectures*, 1895-96, and in *I. L. E.*, XX *Calc.*, 328, where it is held that antecedent debt means with regard to the mortgage "debt antecedent to the transaction," and in the case of a proceeding by suit "debt antecedent to the suit." We take it that antecedent debt in this case means debt antecedent to the suit. There were decrees for Rs. 329 and Rs. 325 against Gyan Chand when plaintiff instituted this suit; these were antecedent debts and plaintiff was under a pious obligation to pay them unless he could show that they bore an immoral taint.

Great reliance is placed by plaintiff's pleader on *Punjab Record*, No. 152 of 1888, where a distinction was drawn between an antecedent debt and a present loan, and it was held as regards the present loan that the mortgagee was bound to establish that the advance was made by him after a reasonable and fair enquiry that satisfied him, as a prudent man, that the money was required for the legal necessities of the family.

This question was considered by Mr. Justice Rivaz in *Punjab Record*, No. 33 of 1892. He there says: "As to the argument that the sons cannot be held liable for an undertaking not arising out of an antecedent debt, in absence of proof that the money was required for the legal necessities of the family, in which connection *Punjab Record*, No. 152 of 1888, is relied upon, it is sufficient to point out that the contention breaks down with reference to the particular facts of this case, and the true question for decision. But what we have now to deal with is the decree subsequently obtained against the father under his contract of guarantee, and the question is whether the whole of the ancestral property is liable to attachment and sale in execution of that decree. The decree was in my opinion undoubtedly obtained for an antecedent debt, and any sale which followed in execution would be in the nature of an involuntary alienation for a debt of that character. The above view renders it unnecessary to consider whether the broad distinction drawn in No. 152 of 1888 between alienations in consideration of a present loan and those for the payment of an antecedent debt can be supported in view of the more recent expositions of the law by the Judicial Committee."

The same distinction as is pointed out by Mr. Justice Rivaz in that case occurs also in this case. Here also there is a decree for costs against the father subsequent to the original mortgage, and that decree is a debt which at the time of instituting the suit plaintiff was under a pious obligation to pay.

But it may be urged that though the amounts of the decrees for costs may be antecedent debts, yet that this does not apply to the whole of the mortgage-money due on the mortgages.

In this connection we must remember that the decrees for possession and the order in execution for the sale of the houses subject to Tulsi Das's mortgages substantially charge the whole mortgage-money on the property.

In *I. L. R., XIII Cal.*, 21, their Lordships of the Privy Council said: "The decisions have for some time established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt, or *the creditors' remedies for their debts*, if not tainted with immorality."

Plaintiff is setting up his right *against the creditor's remedy for his debt*, and he cannot be allowed to do this. It is clear on the authority of *I. L. R., XX Cal.*, 328, that if Tulsi Das were suing Gyan Chand and Jagan Nath for his debt on the mortgage-deeds the whole amount of the mortgage-money would be considered antecedent debt, and that Jagan Nath's property would be liable unless he could prove immoral taint on the debt.

There is no apparent reason why Jagan Nath should be in a better position when he comes into Court and seeks to set aside orders which have been passed against him in furtherance of Tulsi Das's remedy for his debt.

We, therefore, hold that even as regards the cash loan to Gyan Chand made at the time of the mortgage the ~~onus~~ lay upon plaintiff to prove an immoral taint on the debt.

It is then argued that it is proved that the debt was raised for immoral purposes. We have carefully considered the evidence on this point, and the rulings on the subject of what evidence is required on the subject. We think that the evidence is vague and meagre, and falls far short of proving that the money was raised for immoral purposes.

We, therefore, dismiss the appeal with costs.

Appeal dismissed.

No. 73.

Before Mr. Justice Reid and Mr. Justice Anderson.

MAHTAB-UD-DIN,—(DEFENDANT),—APPELLANT,

Versus

KARAM ILAHI AND OTHERS,—(PLAINTIFFS),—

RESPONDENTS.

} APPELLATE SIDE.

Case No. 1353 of 1896.

Pre-emption—Parties with equal rights of pre-emption—Liability of party who privately purchases from original vendor to be defeated by party who subsequently to such purchase sues original vendor and vendee for pre-emption.

A, having sold certain property, in respect of which X and Y had equal rights of pre-emption, to B, X privately purchased the said property from B. Subsequently to such re-sale, Y sued A and B for pre-emption.

Held, that X by his purchase from B had asserted his pre-emptive title in so efficacious a form as to be entitled to have his bargain secured to him against everyone not having a superior right of pre-emption.

No. 138, *Punjab Record*, 1884, and *I. L. R.*, XX *All.*, 100, *followed*.

Further appeal from the order of C. P. Bird, Esquire, Divisional Judge, Hoshiarpur Division, dated 8th May 1896.

Muhammad Shafi, for appellant.

Jaishi Ram, for respondents.

The judgment of the Court was delivered by

REID, J.—The question for decision is whether the plaintiffs-respondents are entitled to possession by pre-emption of certain property in respect of which a deed of sale has been executed in favour of the appellant.

16th Jan'y. 1899.

Ghulam Muhammad sold one-third of a house to Ghulam Ghaus, who in turn sold it to the appellant, owner of another third of the house, the remaining third being owned by the plaintiffs.

The date of the appellant's sale deed is the 7th April 1894, and on the facts we see no reason to hold that the sale was not valid and contracted in good faith, or that the appellant and plaintiffs-respondents had not equal pre-emptive rights.

On the 4th May 1894 the plaintiffs sued for possession by pre-emption, making Ghulam Muhammad and Ghulam Ghaus parties, and, on the latter's statement that he had sold to the appellant, amended the plaint by adding the appellant as a defendant.

The pleader for the respondents contended that notice of suit had been served on the vendor and original vendee before

the 7th April 1894, but has been unable to support this contention from the record, and it is unnecessary to consider how far this service of notice, if proved, would affect the rights of the parties; 62 and 68, *Punjab Record*, 1879, and 83, *Punjab Record*, 1888, relied on by the pleader for the respondents, do not assist them. There is no question here of a pre-emptor having to take over the bargain of a purchaser from the original vendee, neither of whom had rights equal to that of the pre-emptor, or of the vendor and vendee cancelling their sale to defeat the pre-emptor, but the question is whether, where two persons have equal rights of pre-emption, he who purchases privately from the vendee has shown less diligence than, and can be defeated by, him who, subsequently to the purchase by the former, sues the original vendor and vendee for pre-emption. 138, *Punjab Record*, 1884, and *Serh Mal v. Hukam Singh*, I. L. R., XX All., 100, are authority against this proposition. It is contended that in the former case the private sale was to one with superior rights of pre-emption, and that to allow a pre-emptor to purchase privately, is to allow a vendee to choose which of rival pre-emptors should be allowed to purchase, and is opposed to the provisions of the Punjab Laws Act, which allow this choice only to the vendor.

We can find nothing in the Punjab Laws Act in support of the latter contention, while the principle laid down in 138, *Punjab Record*, 1884, applies to a pre-emptor with equal rights, and the Allahabad ruling is directly in point. In 83, *Punjab Record*, 1888, preference was given to the pre-emptor who first asserted his claim.

In the terms of the judgment of Tremlett, J., in 138, *Punjab Record*, 1884, we find that the appellant, by his purchase from Ghulam Ghaus, not only asserted his pre-emptive title, but asserted it in so efficacious a form as to be entitled to have his bargain secured to him against every one not having a superior right, and we decree the appeal and restore the decree of the Court of first instance, with costs here and below.

Appeal allowed.

No. 74.

Before Mr. Justice Chatterji and Mr. Justice Robertson.

KUNDAN AND OTHERS,—(PLAINTIFFS),—APPELLANTS,

*Versus*SUNDAR SINGH AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

} APPELLATE SIDE.

Case No. 393 of 1896.

Custom—Succession—Chundawand or Pagwand rule—Sindhu Jats of Bagiana Kalan, Chunian tahsil, Lahore District—Burden of proof.

In a case in which the parties were Sindhu Jats of Bagiana Kalan, Chunian tahsil, Lahore District, found, that plaintiffs, upon whom the onus rested, had failed to prove that in questions of succession the parties were governed by the *Chundawand* and not by the *Pagwand* rule.

Further appeal from the order of Colonel O. H. T. Marshall, Divisional Judge, Lahore Division, dated 24th February 1896.

The judgment of the Court was delivered by

CHATTERJI, J.—Parties in this case are Sindhu Jats of Bagiana Kalan in the Chunian tahsil of the Lahore District. Plaintiffs are the grandsons of one Jowala Singh and sue their uncles and cousins, on the death of their grandfather, for one-half of his estate on the principle of *Chundawand* because their father Wadhawa Singh was the only son of Jowala Singh by one wife, the defendants being the descendants of the other wife. Jowala Singh appears to have divided his land among his sons for the purpose of cultivation without partition, and plaintiffs' father had about 14 *ghumraos* of land, which were nearly equal to his share by the rule of *Pagwand*. 16th Jany. 1899.

The defendants plead that *Chundawand* is not applicable to the parties but *Pagwand*, and this is the real question in dispute between the parties, the Courts below having rightly found that there was no final partition made by Jowala Singh among his sons, as is further asserted by defendants.

The First Court held that the rule of *Chundawand* governs the parties and gave plaintiffs the decree they asked for, but this was reversed by the Divisional Judge, who found that principle of division was *Pagwand*.

We have gone through the record and examined the precedent relied on by the First Court. The case decided by Munshi Kadir Bakhsh on 29th May 1882 was one from the village of Kanwin, which is not far from Bagiana Kalan, but is not in point. It was a suit between the descendants of one Jodh Singh by his two wives for division of the property left

by one Badan Singh, a collateral equally related to them, on the principle that the sons of Jodh Singh were entitled to equal shares. The defendants contended that they inherited Badan Singh's land according to the rule of *Chundawand*. The judgment of the Court of appeal proceeds mainly on the ground that the parties had partitioned the land on the latter principle through the Tahsildar by private arbitrators and that plaintiffs had agreed to the award and allowed mutation to take place. The Court also expressed an opinion that the *Chundawand* rule obtained among the parties, but Munshi Kadir Bakhsh had held that this was proved in respect of land inherited from collaterals and did not find that it prevailed in the case of lineal succession. Altogether this case appears to be wholly insufficient to prove the custom set up by the plaintiffs.

It is found by every-day experience and has been laid down in numerous rulings of this Court that the usual rule of division of ancestral property among sons and grandsons is *Pagwand*, and it therefore lay on the plaintiffs to prove that the rule of *Chundawand* governs the parties. The *Riwaj-i-am* of Sindhu Jats of *tahsil* Chunian of the Settlement of 1865-68, *vide* answer to question 131, says that *Pagwand* is the custom, and the Customary Law of Lahore prepared by Mr. G. C. Walker at the last Settlement, page 9, question 2, says the same. In No. 63, *Punjab Record*, 1885, it was found after inquiry in Lahore that Sindhu Jats who had emigrated from Kana Kacha in that District to Kot Jograaj in the Gurdaspur District were governed by the custom of *Pagwand*.

All this constitutes a strong case in support of the defendants' contention, and the plaintiffs have failed to rebut it. The oral evidence on both sides is of little value and may be left out of account. It may be the case that the *Chundawand* rule prevailed more in the old days, but there can be no doubt that *Pagwand* is now the dominant custom in the parties' tribe and locality. Probably it is gradually superseding the other everywhere.

We uphold the decree of the Divisional Judge and dismiss this appeal with costs.

Appeal dismissed.

No. 75.

Before Mr. Justice Chatterji and Mr. Justice Robertson.

ARUR SINGH AND OTHERS,—(PLAINTIFFS),—
APPELLANTS,

Versus

MUSSAMMAT LACHMI AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

} APPELLATE SIDE.

Case No. 825 of 1896.

Custom—Alienation by sonless proprietor—Locus standi of remote collaterals to object to alienation—Dhillon Jats, Lahore District.

The right of male agnates to contest alienations by sonless proprietors is founded on the fundamental principles on which land is held among agricultural tribes in the Punjab, and so far from there being any *a priori* presumption against the *locus standi* of male agnates beyond a certain degree of relationship to object to such alienations, the presumption is exactly the reverse.

Held, therefore, in a case in which the parties were Dhillon Jats of the Lahore District, that plaintiffs who were related to the alienor in the ninth degree were competent to object to the alienation in question.

The mere facts that the property in dispute was situate in a large place (*m.* Basin), which was almost a town, that land was held there by various tribes, and that numerous alienations had taken place therein (but almost all subsequently to 1893) without objection by male agnates, *held* not to be *per se* sufficient to establish the right of a sonless proprietor to alienate without necessity.

Further appeal from the order of Colonel C. H. T. Marshall, Divisional Judge, Lahore Division, dated 31st October 1895.

Jaishi Ram, for appellants.

Shib Das, for respondents.

The case was remanded for further inquiry by the following order of the Court, delivered by

CHATTERJI, J.—The facts of this case appear from the judgments of lower Courts. According to the genealogical tree the plaintiffs are related to the alienor in the ninth degree including him as well as the common ancestor Malika in the reckoning. The parties are Dhillon Jats. 15th Jany. 1899.

The first point for decision is whether plaintiffs are competent to object to the alienation by virtue of their relationship to Arjan Singh. The lower Courts have held on the strength of certain rulings of this Court, *viz.*, Nos. 20, *Punjab Record*, 1890, 118, *Punjab Record*, 1891, 9, *Punjab Record*, 1892, 56, *Punjab Record*, 1889, 113, *Punjab Record*, 1883, and 15, *Punjab Record*, 1888, that they are not. We do not think these authorities are

sufficient to justify the decision of the question of plaintiffs' *locus standi* adversely to them on *a priori* grounds. No. 113, *Punjab Record*, 1883, was decided before the burden of proof in regard to alienations of ancestral land by childless proprietors among Punjab agriculturists in the presence of male agnates was definitely laid down by a Full Bench of this Court in No. 107, *Punjab Record*, 1887. In Nos. 56, *Punjab Record*, 1889, and 9, *Punjab Record*, 1892, it was found upon inquiry that by custom remote collaterals were not competent to object though it is noteworthy that the order of remand in the latter case sets out that there was a presumption in favour of the then plaintiffs who were related to the alienor in the eighth degree. In Nos. 118, *Punjab Record*, 1891, and 15, *Punjab Record*, 1888, the finding was in favour of distant collaterals though doubtless the villages in which the disputed lands were situate were held compactly by single tribes. It was also pointed out in the latter judgment that no hard-and-fast rule that relations beyond a certain degree had no *locus standi* could be laid down. No. 20, *Punjab Record*, 1890, was a decision on the facts of that particular case though it followed certain earlier authorities. The tenure of the village is no doubt an important factor in questions of this kind, but it does not by itself enable the Court to decide what degree of relationship entitles a male collateral to object and what disqualifies him from doing so. It has a more immediate bearing on the question whether the childless male proprietor is uncontrolled or not in his power of alienation.

In later decisions of this Court where the matter has been directly considered and decided the rule laid down is that there is no *a priori* presumption against the *locus standi* of male agnates beyond a certain degree of relationship to object to alienations of this description, and that the presumption is exactly the reverse. See Nos. 100 and 101, *Punjab Record*, 1893, where the reported cases on the point were discussed, and it was held that no definite rule could be deduced from them to the effect that relations within a certain degree of propinquity alone could be presumed to be entitled to object to alienations by a sonless proprietor and not those beyond that limit, and that in the case of a plaintiff falling under the latter category the Court would be justified in framing a preliminary issue and calling on him to prove his right to sue by custom. See also No. 14, *Punjab Record*, 1895, to the same effect, and Roe and Rattigan's *Tribal Law in the Punjab*, pages 126, 127.

The right of male agnates to contest such alienations is founded on the fundamental principles on which land is held

among agricultural tribes in the Punjab. As observed by Sir Meredyth Plowden in No. 50, *Punjab Record*, 1893, page 230: "No individual, whether or not he has male issue, is under ordinary circumstances competent by his own act to prevent the devolution of ancestral land in accordance with the rules of inheritance, that is upon his male descendants in the male line, if any, or failing them upon his agnate kinsmen in the order of proximity. The exercise of any power which would affect the operation of these rules to the detriment of the natural successors to ancestral land is liable to be controlled by them whether the act done be a partition or gift or sale or mortgage otherwise than for necessity." This rule has been thoroughly recognized since the passing of the Full Bench decision No. 107, *Punjab Record*, 1887. This being the case all agnates who are heirs by virtue of their relationship have presumably the right of objection to any act which injures their right of succession, and it is difficult to see how an arbitrary line can be drawn in favour of agnates up to a certain degree, and those beyond excluded from the benefit of the presumption. Suppose A has an admitted right to contest an alienation without necessity by B, his collateral fifth in descent from the common ancestor. How can it be assumed that he loses his right, or that it should be presumed not to exist, if B happens to die before him and the alienation is made by B's son.

We find, therefore, on the first issue that plaintiffs have a *locus standi* to sue.

The next issue as to the power of Arjan Singh to alienate without necessity has been found in the affirmative against the plaintiffs' contention. But we are unable to accept this view. The grounds of the lower Courts' decision are that Basin is a large place, almost a town, in which land is held by various tribes, and that numerous alienations have taken place therein without objection by the male agnates. As regards the constitution of the village the information is very meagre. The Patwari says the tenure is *pattidari bhayachara*, and no attempt was made to ascertain its real character. The mere fact that land in the village is held by several tribes is not unfavourable to the plaintiffs if the holdings are compact and ancestral. As regards the alienations more than a hundred are said to have taken place according to the Patwari, but they are almost all subsequent to 1893, and it was therefore impossible to say with any certainty at the time the case was tried that they were not objected to by the collaterals. The facts of these alienations were not inquired into as the lower Courts were apparently under

the impression that a mere multitude of such transfers were sufficient to establish an unrestricted power of alienation. That no suits were filed may have been due to the fact that the reversioners were satisfied that the alienations were proper, or that their consent was obtained, or that they were too poor to litigate, or the amount of land alienated may have been very small. Nothing was done to ascertain if their quiescence was due to any of the above causes. It must also be borne in mind that a reversioner is not bound to sue so that his mere silence generally goes for nothing, while if he sues and obtains a decree the fact goes far to prove the custom. It appears from the Patwari's evidence that there was a suit of this nature in the village before in which decree was passed, *Chetu Singh v. Ohanda Singh*, but the record appears not to have been sent for, nor any attention paid to the case. There has never been a judicial decision that the custom of unrestricted alienation prevails among the proprietors of this village generally, or the Dhillon Jat portion of them in particular. The ordinary presumption is the other way, and there are published cases which show that Dhillon Jats follow the usual agricultural custom. We consider the inquiry on this point has been an extremely perfunctory one, and that a fresh investigation is necessary before it can be properly disposed of.

As regards the last point, *viz.*, whether there was legal necessity for the alienation, it would seem that the first two issues having been decided against the plaintiffs, the lower Courts did not consider it of much consequence and give it more than a cursory notice. This remark is especially true of the Divisional Judge's finding. A considerable quantity of evidence has no doubt been produced by the defendants, but it has not been sifted and properly scrutinized. The broad facts bearing on this question are that Arjan Singh was a young man of 22 or 23 years of age, that he had no ancestral debts to discharge and got the estate, which is a fairly considerable one, altogether unencumbered, and that the debt for which the present mortgage was effected was run up within a short time. Some of the creditors whose debts were paid off by the mortgage are connected with each other. Khushala admits owing money to, and having dealings with, Shankar Das who got the bulk of the mortgage-money. The appellants have filed a mortgage-deed for Rs. 4,000, executed by Arjan Singh after the date of the Divisional Judge's decree, *viz.*, on the 14th May 1896, in which Shankar Das is a joint mortgagee with Gopal Singh and Mul Singh, respondents, to the extent of a half share. This would

indicate that Shankar Das and the present mortgagees have dealings in common, and it is suggested that they all laid their plans together to acquire the land of Arjan Singh by lending him money for gratifying his taste for debauchery and extravagance. Shankar Das is said to be a member of a firm of repute, but he did not produce all his books to support his transactions with Arjan Singh. We refrain from discussing in detail the items said to have been advanced to Arjan Singh as we do not wish at this stage to give a definite opinion on the question of necessity, but the fact of Arjan Singh, a young Jat with no knowledge of business, having taken a liquor contract and sustained losses therefrom and his buying a mare, now dead, from one Khushali for Rs. 128, are matters which strike us as rather peculiar, and the advances made to cover these items deserve to be carefully scrutinized. The circumstances are such that the Court would be justified in asking the alienees to show that they dealt in good faith with Arjan Singh. It is urged by the respondents' pleader before us and stated by some of the defendants' witnesses that Arjan Singh was necessitated to borrow money in order to fight the plaintiffs who were his guardians during infancy and who would not allow him to enjoy the income of his property on attaining majority. The guardians appear to have acted honestly so far that they did not run up debts nor encumber the minor's estate, but their subsequent conduct should be inquired into in order to see whether it compelled Arjan Singh to borrow money for necessary expenses.

We remand the case to the Court of first instance for a further inquiry into the issues—

- (1). Whether Arjan Singh had an unrestricted power of alienation by custom.
- (2). Whether the alienation in dispute was made for necessity, and if so, to what extent.

The investigation should be a searching one and will be completed with all reasonable despatch, and the return of the Court will be submitted through the Divisional Judge who will also give his opinion.

Appeal allowed : cause remanded.

No. 76.

Before Mr. Justice Chatterji and Mr. Justice Robertson.

JOWAHIR SINGH,—(DEFENDANT),—APPELLANT,

APPELLATE SIDE. {

Versus

DIAL SINGH AND OTHERS,—(PLAINTIFFS),—
RESPONDENTS.

Case No. 538 of 1896.

Custom—Alienation—Gift to sister's son followed by possession and mutation of names—"Ancestral property."

In a case in which the property in dispute had been acquired by one K jointly with his brothers, but had never been held by their father, held, that the said property was not ancestral property qua K's collaterals.

Held, therefore, that a gift of such property, followed by possession and mutation of names, by K in his lifetime to his sister's son was not invalid by custom.

Mutation of names by itself does not in every case constitute a valid transfer, but it is good evidence of such transfer.

Further appeal from the order of A. Kensington, Esquire, Divisional Judge, Amballa Division, dated 27th April 1896.

Browne, for appellant.

Shelverton, for respondents.

The judgment of the Court was delivered by

13th Jany. 1899.

ROBERTSON, J.—In this case the plaintiffs sued one Jowahir Singh for possession of certain lands which had come to Jowahir Singh in virtue of his alleged adoption by one Kahna, whose collaterals plaintiffs have been found to be. A deed of adoption was executed by Kahna in Jowahir Singh's favour in 1876, and on 22nd May 1893 Kahna gifted this land orally to Jowahir Singh, the gift being accompanied by possession and mutation of names in the revenue records. Jowahir Singh was sister's son to Kahna, his adoptive father. The original Court found that "as Kahna adopted the defendant as a son, "and also made a gift of his property in his favour, the plaintiffs have no right to contest it, and they are not entitled to "possession." On appeal to the Divisional Court the learned Judge accepted the appeal, holding that the adoption, even if a fact, is clearly invalid, following *Punjab Record*, No. 19 of 1895, and that the property was ancestral, and it could not be alienated to Jowahir Singh by Kahna.

The decision that the adoption was invalid according to custom, we do not propose to discuss.

It appears, however, to be clearly established that over and above the adoption there was a definite gift of this property made by Kahna to Jowahir Singh during his lifetime, i.e., on 22nd May 1893. Mutation of names by itself would not in every case, of course, constitute a valid transfer, but it is good evidence of it, and in this case the fact of the gift is held by the first Court to be established—the learned Divisional Judge has not traversed this finding, and it is therefore to be taken as a fact that the gift was actually completed, and this clearly appears to be so. This being so the only question left for consideration is whether or not this gift was valid, and this again turns entirely on the question whether the property was “ancestral” or not. The learned Divisional Judge says: “It is immaterial whether the land was acquired by a common ancestor or not. The plaintiffs’ claim as heir is not affected by any finding on this point, the evidence showing at most that the land was jointly acquired by all the sons of Amrik Singh from whom both they and Kahna are descended.” As to the question of heirship this is, of course, correct, but it ignores the fact of this gift. As to the property being ancestral it appears that it was acquired jointly by Kahna and his brothers, but was never held by their father, Amrik Singh, and was held separately by Kahna and the plaintiffs. It was therefore clearly not property held by a common ancestor, which is now the accepted definition of ancestral property *qua* collaterals (see *Punjab Record*, No. 43 of 1893, *inter alia*). The fact that several brothers jointly acquired the property does not in this connection make it ancestral; each share was the self-acquired property of the sharer. Kahna *qua* collateral of his father had the same powers of alienation as his father, and acquired property, moveable or immoveable, is ordinarily alienable according to the will and pleasure of the lawful owner, and, moreover, the same power of alienation ordinarily exists with respect to joint and separate property. It must therefore clearly be held that this property is not “ancestral,” and this being so, and the fact of the gift by Kahna to Jowahir Singh being established, there is nothing to show that this gift was invalid, and it must be maintained. The judgment and order of the lower appellate Court is accordingly set aside, and the claim of the plaintiffs dismissed with costs throughout.

Appeal allowed.

No. 77.

Before Mr. Justice Chatterji and Mr. Justice Robertson.

APPELLATE SIDE. {

SARDAR UMRAO SINGH AND OTHERS,—(PLAINTIFFS),—
APPELLANTS,*Versus*SARDAR THAKAR SINGH,—(DEFENDANT),—
RESPONDENT.

Case No. 705 of 1896.

Construction of document—Provision in mortgage-deed regarding interest.

In the case of a mortgage-deed in which there is a rate of interest fixed, without any specific condition that its payment shall cease on a certain contingency, and a clause specifying a date of redemption and conditional sale, it is generally to be held on a consideration of all the terms of the deed taken together, in the absence of clear intention to the contrary, that the contract does not contemplate the cessation of interest from the date when the payment of the capital sum becomes due.

When, therefore, a mortgage deed provided that the mortgagor was to remain in possession, paying interest on the mortgage-money at 6 per cent. per annum half-yearly; that on default of payment of interest compound interest was to be charged; that on default of payment of interest for four successive half-years, possession was to be given to the mortgagee and the produce of the land was to be taken in lieu of interest; that the mortgaged property was to be redeemed within six years, and if not then redeemed, the mortgage was to become *ipso facto* a sale; and it appeared that there had been no breach of the condition regarding the failure to pay interest for four successive half-years previous to the end of the six years allowed for redemption, but that subsequently to the expiry of the said period, there had been a failure to pay interest for four successive half-years,

Held, that as there was no condition that interest should cease to run on the terms stated after the expiry of six years, defendant's failure to pay interest for four successive half-years after the expiry of the six years allowed for redemption was a clear breach of the terms of the contract and entitled plaintiff to obtain possession of the land as mortgagee, and that he was not bound to resort to the other relief, which he might have claimed, of foreclosure.

Further appeal from the order of Khan Muhammad Hayat Khan, C. S. I., Additional Divisional Judge, Amritsar Division, dated 18th April 1896.

Lal Chand, for appellants.

Ganpat Rai, for respondent.

The judgment of the Court was delivered by

17th Jany. 1899.

ROBERTSON, J.—In this case the plaintiffs sued under a mortgage-deed for possession as mortgagees of 804 kanals 6 marlas of land which had been mortgaged to them by defendants by

deed dated 13th September 1878. The original Court decreed the claim, but the lower appellate Court dismissed it. The two Courts differently interpreted the rights of the plaintiffs under the deed, the provisions of which required careful consideration. The deed provides that the mortgagor was to remain in possession, and to pay interest on the mortgage-money at 6 per cent. per annum half-yearly, on default of payment of interest compound interest to be charged ; then comes the important clause—

(5) If default is made in the payment of interest for four successive half-years then possession was to be given to the mortgagee, and the produce of the land was to be taken in lieu of interest ; (6) that the mortgaged property was to be redeemed within six years ; (7) that if it were not so redeemed the mortgage should become *ipso facto* a sale.

There certainly did not appear on the pleadings to have been a breach of the conditions regarding interest for four successive years previous to the end of the six years allowed for redemption, and defendant in his second plea urged that there had been no breach, but that the interest due for these six years had been duly paid. In this Court, however, the counsel for the defendant endeavoured as an alternative defence to contend that, as a matter of fact, default of the first four instalments had been made, and consequently the claim was barred by limitation. This he attempts to support by putting in receipts received from the Court of Wards under whose charge the plaintiffs, minors, were. The dates of what he suggests show this. But it is quite clear from these receipts and the pleas of the defendants that they are for money paid on account of the interest instalments of these six years, and as defendants themselves denied that there had been any breach they cannot be allowed to turn round at the last minute and base their case on the exactly opposite assertion, which plaintiffs have had no opportunity of meeting, i.e., that, as a matter of fact, there was a breach—a fact which the evidence before us does not warrant us in considering to be established. Having disposed of that point, we return to the original claim and defence.

It was contended for the defence that the covenant was only to pay interest for six years, that the provisions that default for four successive half-years was to give plaintiffs a right of entry was to extend only to the six years within which redemption was to be allowed, and that at the expiry of the six years interest would cease to run, and the mortgage would become a sale, the plaintiffs' only relief then being by

way of foreclosure, and these were the grounds on which the lower appellate Court dismissed the claim, and on which the respondent now supports the decree: as to the first point we have a clear ruling of their Lordships of the Privy Council in *XX All.*, page 171, and another in *XIX All.*, page 39. Our attention was also called to *XX Mad.*, page 371, *XXV Calc.*, page 246, *Punjab Record*, No. 28 of 1892, and *Funjab Record*, No. 57 of 1888, all of which we have perused and considered. These cases are very analogous to the one before us, and some of them on all-fours with it, and we must clearly follow the rulings laid down. We are unable therefore to agree with the contention that after the expiry of the period of redemption without redemption having taken place, interest ceased to run. In the case decided by their Lordships of the Privy Council, recorded in *XIX All.*, page 39, plaintiff had sued on a mortgage-deed in which the covenants were for payment of the redemption money within a year, and interest thereon at a certain rate. The deed provided that the borrower should not transfer the mortgaged property until payment in full of the amount due for principal and interest had been made, and that any money paid should be first credited to the latter. In a suit brought more than seven years after the date fixed for payment, the Courts, including the High Court of Allahabad, gave effect to the defence that the creditor had no right under the contract to interest at the specified rate for any period after that date. On appeal to the Privy Council, however, it was held that on true principles of construction of the terms of the deed as a whole it must be held that the creditor was entitled to payment of the principal with interest at the rate specified in the deed for the entire period of non-payment. In *XX All.*, page 171, it was similarly held in the case of a deed, the terms of which as regards payment of interest are very similar to the terms of the deed before us, that according to the tenor of that deed, when all its provisions and conditions were considered, it was not the true construction that the capital sum was to cease to bear interest at the contract rate upon the arrival of the time stipulated for payment.

It would appear from these judgments that, unless the contrary appear, when we have a mortgage-deed in which, as is very commonly the case, there is a rate of interest fixed without any specific condition that its payment shall cease on a certain contingency, and a clause specifying a date of redemption and conditional sale, it is generally to be held on a consideration of all the terms of the deed taken together in the absence

of clear intention to the contrary that the contract does not contemplate the cessation of interest from the date when the payment of the capital sum becomes due. Applying these principles followed in other rulings quoted to the case before us, we are constrained to hold that there was no condition that interest should cease to run on the terms stated after the expiry of six years; that there has therefore been a clear breach of those conditions and of the covenant to pay interest in respect of four consecutive half-yearly instalments after the expiry of the first six years, as is indeed admitted; that the plaintiff had a right to obtain possession of the land as mortgagee; and that he was not bound to resort to the other relief which he might have claimed of foreclosure, as we are informed he has now done.

We must notice for a moment the objections raised by the respondent's counsel that this appeal must be dismissed because plaintiff has now had recourse to the relief of foreclosure. We fail to see any force in this contention. The suit for foreclosure does not affect his right to prosecute this appeal, which for reasons given above we accept with costs, and restore the decree of the original Court.

Appeal allowed.

No. 78.

Before Mr. Justice Chatterji and Mr. Justice Robertson.

CHET SINGH AND OTHERS,—(DEFENDANTS),—

APPELLANTS

Versus

**SAMAND SINGH AND OTHERS,—(PLAINTIFFS),—
RESPONDENTS.**

APPELLATE SIDE.

Case No. 1307 of 1895.

Custom—Succession—Suit between co-proprietors of village in which the land was situate and deceased's near agnates residing in another village—Finding in a previous suit that one of the co-proprietors was deceased's collateral, effect of—Res judicata—Dhillon Jats of Naraingarh, Amritsar District.

Plaintiffs, who were residents of Bhutiwala in the Ferozepore District, claimed certain land left in Naraingarh, Amritsar District, by one Mussamat Premi, widow of Attar Singh, a Dhillon Jat, on the ground that they were descendants of Budh Singh, grandfather of Attar Singh, one plaintiff being his son and the others grandsons and great-grandsons. The defendants were Dhillon Jats of Naraingarh, but claimed no relationship with the deceased, and belonged to a different *tarast* to that of Attar Singh. On the death of Mussamat Premi defendants obtained mutation of names in

their favour despite the objections of plaintiffs who, therefore, instituted the present suit. In the first Court defendants pleaded, *inter alia*, that plaintiffs were not the agnates of the deceased's husband, and that being residents of another village and district, and having had no connection with Naraingarh or the family of the deceased, they were excluded by law and custom. The first Court drew issues in accordance with the pleadings, and decided them all in favour of plaintiffs. Defendants appealed to the Chief Court on the same grounds as were urged in the lower Court, and at the hearing it was also contended on their behalf that plaintiffs' claim was barred by a judicial decision of the then Assistant Commissioner of Amritsar, dated 25th August 1871, by which defendants were declared reversioners of the deceased widow, and obtained a decree setting aside, as far as their interests were concerned, a certain mortgage effected by her of part of the land left by her husband. The ground upon which the defendants' contention was based was that in the former suit the widow represented the interests of the reversioners, and that the decision that one of the defendants was her reversioner bound the present plaintiffs if they were the person by agnatic descent entitled to succeed to the estate left by her.

Held, overruling the said contention, that the finding in the former case was merely to the effect that the defendant in question was a collateral of the widow, and as such was competent to contest the widow's mortgage, and that the said finding in no way precluded plaintiff from proving that they were nearer collaterals and had a preferential claim to succeed to the property.

Found, upon the evidence, that plaintiffs were nearer collaterals than the defendants.

Held, therefore, that the plaintiffs' relationships being established, they were the *warisan ek jaddi* of the deceased widow's husband, and their common ancestor had been in possession of the land in suit, and that in such a case there was no authority for holding that the collaterals, because residents in another village, were excluded by the other proprietors in the deceased's village though not related to him.

First appeal from the order of W. A. Harris, Esquire, District Judge, Amritsar, dated 30th October 1895.

Lal Chand, for appellants.

Sham Lal, for respondents.

The judgment of the Court was delivered by

18th Jany. 1899.

CHATTERJI, J.—This is a suit for land left in Naraingarh in the Amritsar District by one Mussammat Premi, widow of Attar Singh, a Dhillon Jat. The plaintiffs are residents of Bhutiwala in the Muktasar *tahsil* of the Ferozepore District, and claim to be the descendants of Budh Singh, the grandfather of Attar Singh, Samand Singh, plaintiff, being his son, and the other plaintiffs his grandsons and great-grandsons. The defendants are Dhillon Jats of Naraingarh, but claim no relationship with the deceased, and belong to a different *taraf* to

that of Attar Singh. On the death of Mussammat Premi the defendants got mutation of names in their favour in spite of the plaintiffs' objection. Hence the claim.

The suit was brought originally for a declaratory decree to which the defendants objected that the plaintiffs were not entitled to get such a decree as they were out of possession. The first Court overruled the objection, holding that plaintiffs' possession was proved. The contention was again raised in this appeal, and at the last hearing on 7th July 1898 we held, after going through the evidence, that it was well founded, but allowed the plaintiffs to amend their plaint, and to add a prayer for possession after making up the necessary stamps. This has been done, and the objection has thus been disposed of.

The defendants' pleas on the merits are set out in the second, third and fourth paragraphs of their *jawab-dawa*, pages 2 and 3 of the printed record ; they did not, as already stated, claim to be agnates of Mussammat Premi's husband, but denied that plaintiffs were such, and urged that being residents of another village and district, and having had no connection with Naraingarh or the family of the deceased, they were excluded by law and custom, and that defendants being co-proprietors in the village and being of the same *qôl* had a superior title.

The Court below drew issues in accordance with the pleadings, and found them in plaintiffs' favour, and gave them a decree from which the defendants appeal on the same grounds as were urged before the District Judge. At the hearing their counsel raised a new point on which he laid great stress, *viz.*, that the plaintiffs' claim is barred by a judicial decision of Captain Marshall, Assistant Commissioner, Amritsar, dated 25th August 1871, by which defendants were declared reversioners of the deceased widow, and got a decree setting aside a mortgage for Rs. 500 effected by her of part of the land left by her husband so far as their interests were concerned, except to the extent of Rs. 200.

The record of that case has not been produced, nor any English judgment of the Assistant Commissioner, but from a vernacular translation of that judgment it appears that the suit was brought by Chet Singh, one of the defendants, that the widow denied his relationship and set up her unrestricted power of alienation, but that she subsequently filed a genealogical tree which the plaintiff accepted, and from which it appeared that he was a distant collateral. The Court also found that Mussammat Premi could only alienate for necessity,

and that necessity was proved to the extent of Rs. 200. The Court held the plaintiff to be entitled to a declaratory decree, that on the widow's death he could get the land on payment of Rs. 200 only as mortgage-money and passed a decree to that effect.

Although the point of *res judicata* was not raised in the lower Court, nor in the written grounds of appeal, yet as it can be raised at any stage, provided it can be supported on the existing record, we made no objection to the contention being put forward at the hearing. This question being preliminary to the merits of the case must first be noticed and decided.

Counsel quoted two judgments of their Lordships of the Privy Council, *vis.*, *Hari Nath Chatterjee v. Mothurmohun Goswami*, I. L. R., XXI Cal., 9, and *Sri Raja Ran Lakshmi Kantaiyamm v. Sri Raja Inuganti Rizaqpal Run*, I. L. R., XXI Mad., 344, and a decision of this Court No. 29, *Punjab Record*, 1895, in support of his argument. He also referred to Nos. 139, *Punjab Record*, 1888, and 74, *Punjab Record*, 1895. Briefly his contention was that the widow represented the interests of the reversioners, and that the decision that Chet Singh, the plaintiff, in the former case was her reversioner binds the plaintiffs if they are indeed by agnatic descent the persons entitled to succeed to the estate left by her.

We cannot accede to this contention. Indeed, looking to the circumstances of this case it appears to us so untenable that we should not have bestowed on it any but a passing notice had it not been urged with great pertinacity by a counsel of Mr. Lal Chand's experience and standing. None of the cases quoted appear to us to be in point. In the Calcutta case the point ruled was that reversioners are bound by the results of a litigation fought out in good faith by the female holder for life. The plaintiffs' mother had in her lifetime sued the defendants for possession of certain property, and it had been decided that her claim was barred by time. Plaintiffs brought a second suit for the same property after her death, and it was held that it was barred by the decree in the previous suit. The plaintiffs had acquired by gift a share of the property from their mother's sister's son, who was also a reversioner in plaintiffs' mother's lifetime, and was equally bound by the decree, and it was decided that the bar applied to this share as well. In the Madras case it appears that a Hindu widow who had succeeded to her son's property was sued by the plaintiff's adoptive father, on whose

death plaintiff was substituted on the record, for a declaration that he was entitled to the reversion of the estate held by her, and that certain alienations made by her were not binding on him. She denied the claimant's title, and asserted that the property in her possession except a trifle was her *stridhan*, and that her daughter and daughter's son were her next heirs. These were put on the record, and finally a decree was passed in favour of the plaintiff declaring his right of reversion. The plaintiff's adoptive father was the brother's son of the widow's husband, and it is clear the finding that plaintiff's adoption, the validity of which was denied, was good, and that the property was not the widow's *stridhan*, concluded all questions in controversy between the daughter and the plaintiff. The former took possession of the property on her mother's death, and on plaintiff's claiming possession it was held that she was precluded by the findings in the former suit from raising those questions again. This case is not at all analogous to the present one. In No. 29, *Punjab Record*, 1895, a daughter was held to be bound by the finding in a previous suit between her mother and the plaintiff, that the latter was the duly adopted son of her father's younger brother, though the subsequent suit related to different property. There is nothing in this judgment to support the appellants' contention. The last principle is a well settled doctrine of the law of *res judicata*. The proposition that the reversioners are bound by the results of a *bonâ fide* litigation conducted by the widow in possession of property which would ultimately devolve on them is too well established to be doubted. No detailed notice need therefore be taken of the two other cases quoted by the appellant which are mainly intended to support it.

In the suit of 1871 assuming, as is probably the case, though the appellant did not adduce any proof of it, that the Assistant Commissioner would have been competent to try the present suit, all that was decided was that the then plaintiff was a distant collateral, and had therefore a right to contest Mussammat Premi's mortgage, and that the mortgage was good to the extent of Rs. 200 only. The real character of the decree has already been noticed. It was not a decree for redemption in favour of the plaintiff to take effect on Mussammat Premi's death. Now the findings that Chet Singh, now one of the defendants, was a distant collateral of Attar Singh, and therefore competent to contest the widow's mortgage, cannot prevent the present plaintiffs from showing that they are nearer collaterals, and have a preferential claim to succeed to the

property. It was not found as in the Madras case that Chet Singh was the nearest reversioner, plaintiffs were no parties to the suit, and the question of their right was never mooted, much less decided, directly or in effect. Their Lordships of the Privy Council take special care to point out in the Madras case that the question of the plaintiff's being the nearest reversioner was clearly raised in the pleadings, and that the daughter on being made a party in the preceding suit distinctly set up her own rights in opposition to those of the plaintiff. In No. 29, *Punjab Record*, 1895, the finding that the plaintiff was the adopted son of the widow's husband's brother necessarily decided the question of his title to the joint property belonging to the brother, and this was binding on her daughter who claimed to be her reversioner.

The law of *res judicata* requires that the matter pleaded in bar should have been previously determined either expressly or by necessary implication. This, of course, presupposes that there was a substantial contest on the point between the parties or their predecessors or privies in title. This happened in all the three cases quoted by counsel. In the present case there is nothing in the finding of the Assistant Commissioner in the suit of 1871 which militates against the plaintiffs' claim. That Chet Singh was held to be a distant collateral does not, as already stated, prevent plaintiffs from showing that they are more nearly related to Attar Singh, while the fact that he got a declaratory decree against the widow's alienation is not even *prima facie* proof that he was held to be the nearest reversioner. In Indian practice it is an every-day experience that such decrees are granted in favour of remote reversioners where the near ones do not object to the widow's alienation, or have precluded themselves by their own acts from contesting it, or are females with limited rights. In such cases the nearer reversioners do not lose their right of succession on the widow's death by reason of the decrees. It is easily conceivable that a near reversioner might be absent when the alienation takes place, or his existence might be unknown. Would the fact of a more distant reversioner getting a decree without any mention being made of him preclude him asserting his rights when the succession opened out? We do not think any of the authorities cited by appellants' counsel establishes any such proposition.

Further, if this argument had any force it would have been necessary to see whether the widow litigated in good faith in that case so as to bind the reversioners' interest. Good faith

presupposes at least ordinary care. But it appears that the widow in 1871 though she denied Chet Singh's relationship at first herself propounded a genealogical tree which was accepted by the plaintiff, and which showed him to be a remote agnate. Yet in the present case Chet Singh has not been able to produce any such tree, nor to prove his relationship. The plaintiffs cannot be held bound by the results of a litigation so negligently and carelessly conducted. See No. 29, *Punjab Record*, 1898.

We accordingly overrule the contention that the plaintiffs are barred from making their claim by the rule of *res judicata*.

As regards the question of plaintiffs' relationship to Attar Singh we see no reason to differ from the finding of the District Judge. The pedigree-table of Mauza Bhutiwala of the Settlement of 1873, pages 15 and 16 of the printed record, shows Attar Singh to be the grandson of Budh Singh, and it is stated that Budh Singh has land at Naraingarh which is in possession of Dewa Singh, Attar Singh's father and son of Budh Singh. The genealogical tree of Naraingarh prepared in the Settlement of 1894-95 makes no mention of the plaintiffs' branch, but the remarks under it, para. I, show that Budh Singh founded the village 72 years before, and on becoming poor went away to Malwa, whence he was brought back by Dharam Singh, the defendants' ancestor. This to some extent corroborates the entries in the pedigree-table of Bhutiwala. The pedigree-table of the previous settlement contains a statement to the same effect. In addition to this there are three witnesses called by the plaintiffs who support their allegation as to relationship, and one of whom, Kharak Singh, is aged 70 years, and is resident of defendants' village. This oral evidence by itself is possibly not very strong, but taken in connection with the pedigree-table of Bhutiwala, which is to be presumed correct, it is sufficiently reliable. Besides, Samand Singh, one of the plaintiffs, is actually a son of Budh Singh, so that the fact of Budh Singh's existence has probably not passed beyond the memory of man. From the *shajra-nasabs* of Naraingarh he appears to have been a man of some mark as he held the village in *jagir* in Sikh times, and therefore likely to be known to and remembered by the witnesses. The date of foundation of the village given in the two settlement records makes it probable that he was actually seen by some of the witnesses, for he was then in all likelihood in his prime, and he is said to have been brought back to the village a second time during the reign of Maharaja Sher Singh. He must therefore have been alive as late as 1841-43. On the

whole, we think the relationship of the plaintiffs to Attar Singh is well proved by the evidence. The defendants have produced nothing to rebut it.

The next point argued by counsel is that according to the genealogical trees of both settlements when Budh Singh was brought back to the village by Dharam Singh he really gifted half of it to Budh Singh as he had taken possession of the whole after the latter's abandonment, and that on failure of the issue of Attar Singh the land ought to revert to the donor's family. We do not think the settlement records establish a gift to Budh Singh by Dharam Singh, and even if this were the case the plaintiffs being the lineal descendants of Budh Singh would, we apprehend, have a superior claim to succeed by custom. No. 12, *Punjab Record*, 1892, appears not to have any bearing on the case.

Lastly, it is contended that plaintiffs being residents and proprietors in another village and district are excluded by the defendants who are co-proprietors in the village where the land is situate. Nos. 143, *Punjab Record*, 1888, 64 and 141 of 1893, are quoted in support of this contention. In the first case the contest was between agnates equally related, and it was held that having regard to the partition made by the common ancestor by making two groups of his descendants and giving them land in two different villages, and bar equities of the case, the relations resident in the same village as the deceased presumably had a prior claim by custom to his share. No. 64, *Punjab Record*, 1893, related to land acquired left a person in a village different to his village of origin, and it was held that his male collaterals from the latter place had no right to succeed to such property in preference to his daughter's son, and an opinion was expressed that in such case the co-proprietors of the village in which the land was situate had probably a superior right of succession to the claimants. This, however, was not decided expressly or by implication. In No. 141 of 1893 the plaintiff was the son of a female cousin of the last male owner, a Jat, whose ancestor had got it by gift from one of the village proprietors. The defendants were the village proprietors who were of the same caste as the deceased, but belonged to a different *gôt*. It was held that plaintiff was not in the line of heirs of the deceased not being one of his *warisan ekjaddi*, and that the burden of proving a superior right to that of the defendants who were in possession lay on him which he had not discharged.

None of these cases furnish a guiding principle for the decision of the point raised by appellants. The plaintiffs are,

their relationship being established, the *warisan ekjaddi* of the deceased widow's husband, and their common ancestor, Bādh Singh, was in possession of the land in dispute. There is no authority for saying that in such a case the collaterals, because resident in another village, are excluded by the other proprietors in the deceased's village though not related to him. To say so would be to practically lay down the broad proposition that collateral succession to ancestral land in another village, where the claimants own no land, is disallowed by custom. In other words a man's own brother may thus be postponed to utter outsiders. We do not think there is any such rule of customary law in force, and no evidence has been produced by the plaintiffs in this case to establish it.

The appeal is dismissed with costs.

Appeal dismissed.

No. 79.

Before Mr. Justice Clark, Chief Judge, and Mr. Justice Reid.

CHIRAGHA AND OTHERS,—(PLAINTIFFS),—
APPELLANTS.

Versus

MAHTABA AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

} APPELLATE SIDE.

Case No. 724 of 1896.

Limitation Act, 1877, Articles 141, 142—Adverse possession—Suit by reversioners on death of widow.

In a case in which it was proved that adverse possession had begun against a certain widow in 1882, that the said widow died in 1883, and that her reversioners sued in 1895 for possession,

Held, that the reversioners' cause of action accrued on the death of the said widow, and that their suit, instituted within twelve years of that event, was within time.

Vundravandas v. Oursondas, I. L. R., XXI Bom., 646, approved.

Further appeal from the order of O. P. Bird, Esquire, Divisional Judge, Hoshiarpur Division, dated 12th May 1896.

Lal Chand, for appellants.

Ishwar Das, for respondents.

The facts of the case sufficiently appear from the judgment of the Court delivered by

REID, J.—This is a suit by the collaterals of Sahib Singh 23rd Jany. 1899. for property in the possession of the respondents, which the plaintiffs-appellants allege to have been left by Sahib Singh.

The suit was decreed in part by the Court of first instance, and was dismissed by the lower appellate Court solely on the ground that it was barred by limitation under Article 142, Schedule II, of the Limitation Act. We are satisfied, and indeed it is practically admitted, that Sahib Singh was recorded as owner of the land in suit at the Settlement of 1852, that he continued to be so recorded until his death in 1867, and that from 1867 until the Settlement of 1882 his widow, Mussammat Sundran, was so recorded as his successor. With the exception of a small area recorded as cultivated by Sahib Singh, his land was recorded as being in possession of various tenants and co-sharers, including some of the defendants, as cultivators.

The only indication pointed out to us that this state of affairs did not continue until 1882 is an allusion to the partition of the *shamilat* in proportion to the cultivating holding recorded, in proceedings commenced just before the death of Sahib Singh, and we see no reason to hold that any adverse title, such as would terminate the relation of landlord and tenant or licensor and licensee, was set up until 1882.

{On becoming aware that the land in suit had been recorded in the names of others by the Settlement authorities Mussammat Sundran objected, was referred to the Civil Courts, and died in May 1883. The present suit was instituted in April 1895, within twelve years of the death of Mussammat Sundran.

In this view of the facts it is not contended that the suit is not governed by Article 141, Schedule II, of the Limitation Act, but the pleader for the respondents relies on No. 74, *Punjab Record*, 1895, as authority for the proposition that the suit is barred by limitation, even under that article.

On the facts, as already stated, we hold that adverse possession did not begin to run against Mussammat Sundran until July 1882, and her cause of action accrued then. In No. 74, *Punjab Record*, 1895, the then Senior Judge said, in referring the appeal to a Bench, "If the gift by A. K. to S. K. was invalid, the widow "would have had a right to sue for possession in 1882, which "right to sue would devolve on the kinsmen at her death, and "would be barred in twelve years from that date. I understand that this point is not decided, but there seems to be a "leaning to the view that her non-claim might be disregarded "by the heirs, which seems to me a questionable view."

It is contended that this amounts to a ruling that where time has begun to run against the widow it continues on her death against the reversioners, against whom possession would

become adverse twelve years after it commenced against the widow.

We cannot allow this contention. Suggestions thrown out in an order of reference are not rulings, and no decision was arrived at in the order, while "that date" may refer either to "1882" or to "her death." The judgment on the reference does not help the respondent, nor do the authorities quoted therein, some of which go further than it is necessary to go for the purposes of this appeal.

The case law on the subject is summed up by the late Chief Justice of the Bombay Court in *Vundravandas v. Curson-das, I. L. R., XXI Bom.*, 646, at page 670, thus: "It is clear that "adverse possession against a Hindu widow for any period less than the full statutory period of twelve years is now valueless as against the person entitled to succeed on her death. He has still the full statutory period of twelve years to sue after her death. No time has in that case run in favour of the adverse possession against the Hindu male heir. This was not so under the old law. Under it time was running in his favour during the widow's lifetime. Now it begins to run in his favour only on her death. A Hindu entitled to the possession of immoveable property on the death of a Hindu female appears to us to mean a Hindu whose title to the possession of immoveable property accrues upon the death of a Hindu female, and does not except the case where, during the lifetime of the widow, the adverse possessor has been in possession for twelve years. This view of the law has been accepted by all the Indian High Courts with the exception perhaps of Madras, but there the question was not discussed."

As already remarked, this goes further than is necessary for the purpose of this appeal, but we have no hesitation in concurring in the rule laid down, and we hold that the appellants' cause of action accrued on the death of Mussammat Sundran, and that their suit instituted within twelve years of that event was within time. We set aside the decree of the lower appellate Court and remand the appeal under Section 562 of the Code of Civil Procedure for decision of the undecided issues. The court-fee on the memorandum of appeal in this Court will be refunded, and costs will be costs in the cause.

Appeal allowed: cause remanded.

No. 80.

Before Mr. Justice Clark, Chief Judge, and Mr. Justice Anderson.

DESA SINGH,—(PLAINTIFF),—PETITIONER,

Versus

NARAIN DAS AND ANOTHER,—(DEFENDANTS),—
RESPONDENTS.

REVISION SIDE. }

Case No. 1369 of 1897.

Jurisdiction of Small Cause Court—Suit by lessee of Government ferry for recovery of tolls—Small Cause Court Act, 1887, 2nd Schedule, Article 13.

Held, that a ferry, such as that at Khushalgarh, must be regarded as immovable property vested in the Local Government, and that a plaintiff, when claiming as lessee of the ferry to recover tolls or dues, claims to recover by reason of an interest in immovable property transferred to him by Government.

Held, therefore, that such a suit is excluded from the cognizance of a Small Cause Court by Article 13 of the 2nd Schedule to the Small Cause Court Act, 1887.

Petition for revision of the order of L. White King, Esquire, District Judge, Kohat, dated 27th April 1897.

Ishwar Das, for petitioner.

Shelverton, for respondents.

The judgment of the Court was delivered by

4th Jany. 1899.

ANDERSON, J.—This case with several others based on the same grounds has been sent before a Bench for decision by an order of a Judge in Chambers who had some doubts as to the correctness of the decision of a single Judge of this Court as reported in *Punjab Record*, No. 48 of 1897, in which it was held that a suit by the lessee of a Government ferry for recovery of tolls falls under Article 13 of the 2nd Schedule of the Small Cause Court Act of 1887, and is, therefore, excluded from the cognizance of a Small Cause Court, and that the decree then passed by a Munsiff was not appealable to the Court of the District Judge.

We have heard arguments and have referred to the law bearing on the question at issue as laid down in the General Clauses Act, X of 1897, and the Northern India Ferries Act, XVII of 1878. The conclusion we reach is that a ferry such as that at Khushalgarh must be regarded as immovable property vested in the Local Government and that the plaintiff, when claiming as the lessee of the ferry to recover tolls or dues, claims to recover by reason of an interest in immovable property transferred to him by Government, and this suit must be held to fall under Article 13 of the 2nd Schedule of Act IX of 1887.

We are, therefore, of opinion that the suit was not cognizable by a Small Cause Court, and, consequently, the appeal from the order of the Munsiff lay, not to the Court of the District Judge, but to that of the Divisional Judge.

Accepting the appeal on the first ground, without, in any way, going into the merits of the case, we set aside the District Judge's order and direct that the appeal to his Court be returned to the plaintiff for presentation in the Court of the Divisional Judge. The Court-fee will be refunded on application. Costs of this Court to be costs in the cause. Pleader's fee Rs. 10.

Application allowed.

No. 81.

Before Mr. Justice Chatterji and Mr. Justice Robertson.

NIHALA AND OTHERS,—(PLAINTIFFS),—APPELLANTS,

Versus

BIKHAM RAM,—(DEFENDANT),—RESPONDENT.

} APPELLATE SIDE.

Case No. 378 of 1896.

Suit for possession on ground that a certain sale was invalid as against plaintiff—Plea by defendant that plaintiffs acquiesced in sale—"Acquiescence"—Estoppel.

Plaintiff sued for possession of certain land and houses which had been sold in 1876 by their near collateral, one K., a childless proprietor, in favour of defendant. The defendant pleaded, and the lower Court found, acquiescence in the sale on the part of plaintiffs disentitling them to set aside the alienation, and dismissed the suit. It was proved that plaintiffs, whether or not they knew of the alienation at the time it was effected, had knowledge of it in 1878, when they gave evidence on behalf of defendant in a case in which he sued a certain tenant of his for damages for cutting a tree; that they made no mention of their rights, though present on each occasion, when the defendant twice applied, in 1880 and 1886, for partition on the strength of his deed of purchase; that they also raised no objection to his acquiring the rights of certain hereditary tenants, and that, finally, many years after the sale they took up some land from the defendant for the purpose of cultivation and tilled it almost up to the date of suit. In the last case it appeared that plaintiff, subsequently to partition proceedings, exchanged certain lands allotted to them for others which had fallen to the share of defendant, and executed certain documents, in one of which they expressly stated that they accepted the purchase by defendant in 1876 and waived all rights to object thereto. On behalf of plaintiff it was contended that inasmuch as all the above-specified acts took place *after* the sale, plaintiffs were not thereby estopped from attacking the said transfer as they had not by any such act misled the defendant or induced him to enter into the sale transaction.

Held, that plaintiffs were precluded by their acquiescence and express words from making the present claim, and that their suit had been rightly dismissed.

The term, acquiescence, has divergent significations and the authorities are numerous as to the circumstances under which it amounts to an estoppel or bars claims to set aside the act acquiesced in. The English rule is thus stated in *Duke of Leeds v. Amherst* (11 Ph., 117): "If a person having a right and seeing another person about to commit, or in the act of committing, an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to it being committed, he cannot afterwards be heard to complain of the act." This Lord Cottenham said was the proper sense of the term acquiescence. In *De Bussche v. Alt* (VIII Chan. D., 286), however, the Court of Appeal laid down that when the act complained of was once completed without the knowledge or assent of the party whose right was infringed, the matter must be determined by very different legal considerations. A right of action was vested in him which at all events, as a general rule, could not be diverted without accord or satisfaction or release under seal, and mere submission to the injury short of the period limited by the Statute could not take away such right, and even an express promise by a person injured that he would not take legal proceedings could not by itself constitute a bar, for the promise would be without consideration and not be binding.

This is the principle contended for by appellants before us, as it is strenuously urged that no acts of the plaintiffs prior to, or contemporaneous with, the sale by Kharku are relied upon by the defendant as showing that they had no objection to it, and that acts subsequent to the sale cannot operate to deprive the plaintiffs of their right.

There are, however, numerous Indian authorities which hold that conduct analogous to that of the plaintiffs precludes them from suing to set aside an alienation of immovable property. *Nilatatchi v. Venkatachala Mudali* (1 Mad. H. O. Reports, 131), in which a silence of nine years was held to bind plaintiff to a deed of sale to which he was no party, but which conveyed along with others his share in certain land; *Mussummat Jan Koonwar v. Ram Ruttun Neogi, &c.* (XVIII W. R., 500), where long silence irrespective of limitation was held to bind the plaintiff to the terms of a *mokarrari* lease. See to the same effect, *Jeebun Mundul, &c., v. Nadyar Chand Roy* (XXV W. R., 461). In No. 82, *Punjab Record*, 1881, an owner of land who made no objections to an invalid alienation by an occupancy tenant for over five years was held to have acquiesced in it and

thereby to have precluded himself from suing to annul it; his silence being treated under the circumstances as equivalent to consent. Instances of this kind can easily be multiplied.

In No. 138, *Punjab Record*, 1888, a plaintiff who was the mortgagee of property of which he claimed the right of pre-emption and had given notice to the vendee and recovered the mortgage-money was held to have acquiesced in the sale and waived his right, the Court being of opinion that "it would be against good conscience that a mortgagee who is also pre-emptor should be allowed to deal with a purchase of property one day on the footing that the sale is valid as between them and when he has thus procured the payment of his mortgage, to treat the purchase the next day on the footing that the sale is invalid as between them."

We have quoted the above cases regarding transfer of property and omitted all reference to those relating to obstruction of way, light and air and removal of buildings and plantations and suits of the like character where mandatory injunctions are sought and where such injunctions have been refused on the ground of plaintiff's laches, or acquiescences, the former class being most analogous to the case before us.

The plaintiffs' position during Kharku's lifetime was this. Kharku, a childless male proprietor, had not by custom an unrestricted right of transfer. He could only alienate for legal necessity. If he sold without such necessity his act was not a nullity, but conferred a complete title on the purchaser subject to its being avoided at the instance of the plaintiffs. The right of avoidance only arose on Kharku's death. During his lifetime plaintiffs could only sue for a declaration that the sale was not binding against them. What they did was not only to refrain from bringing such a suit but to let the defendant vendee understand by their acts, conduct and language that they had no objection to the sale and recognized its validity. It is not asserted that the sale was unknown to them at the time and it would be absurd for them to say so considering that they were residents in the village. At all events in 1878, when defendant sued the tenant and they were called as witnesses, they must have known of the fact. At that time they never so much as mentioned their rights nor when the vendee applied for partition twice on the strength of his deed of purchase. Then they, many years after the sale, took up some land from the vendee for the purpose of cultivation and tilled it up to almost the time of suit. They also agreed to his acquiring the rights of certain hereditary tenants. From all these acts and from the general

tenor of their conduct the defendant could not but have understood that they were quite agreeable to the sale and waived their right of avoidance. Mere silence or delay may not justify any such conclusion, but a series of acts and a course of conduct of this character would very naturally, if not necessarily, give rise to such an inference. There is no question that defendant has done many things on this understanding which he would not have done otherwise, and which would otherwise be detrimental to him. The plaintiffs also have fully enjoyed the benefits of such an impression on the defendant's mind. They have got his land for cultivation and effected exchanges of land with him which had they disputed his title he might have refused to allow. Lastly they have in Exhibit 11 expressly accepted the sale, and on that footing got exchanges of land effected.

In our opinion it would be contrary to good conscience if they are now allowed to turn round and to attack the sale and to deprive the purchaser of the benefit of his purchase. It is all very well for them to say that defendant can be restored to his position after the sale took place by being allowed to retain his purchases of occupancy rights and compensated for other improvements, if any, but this is not the real question. At the time the plaintiffs' acts were done and the exchanges effected, plaintiffs' position was not free from difficulty and doubt, even if we assume they had any intention of contesting the sale. They made the best use of their position by getting certain advantages for themselves, though these might not have been at the time altogether commensurate with the value of the land, and they cannot now avoid their acts because they find with reference to recent rulings of this Court that the bargain was not a good one. There was, we think, good consideration in the exchanges allowed by defendant when the consent to Kharku's sale, recited in Exhibit 11, was given. They cannot repudiate that consent after this lapse of time. They have retained the benefits of that transaction and have not even offered to restore them.

We see no reason to think that plaintiffs did not know their rights when they expressed their acceptance of Kharku's transfer. The very act itself negatives any such contention. It is possible that they did not think their rights were so strong as the recent judgments of this Court appear to show, but this is not material, and moreover it is probable that they were satisfied of the necessity of the sale, as Bhupa admits that the land was previously under mortgage. But it is not necessary to go into this question.

We think the plaintiffs are precluded by their acquiescence and express words from making the present claim, and that their suit was rightly dismissed in the Court below.

The appeal is therefore dismissed with costs.

Appeal dismissed.

Full Bench.

No. 82.

Before Mr. Justice Clark, Chief Judge, Mr. Justice Chatterji and Mr. Justice Anderson.

BUTA,—(PLAINTIFF),—APPELLANT,

Versus

MUSSAMMAT JIWANI,—(DEFENDANT),—RESPONDENT.

} APPELLATE SIDE.

Case No. 168 of 1898.

Partition—Right of widow who has succeeded to her husband's interests in joint holding to claim partition—Grant of such prayer by Revenue Officer—Jurisdiction of Civil Court to entertain subsequent suit by co-sharers objecting that widow is by custom not entitled to claim partition—"Question as to title"—"Owner" and "Lifetowner"—Punjab Land Revenue Act, 1887, Sections 111, 115, 116, 158.

Held, by the Full Bench, that though a widow who succeeds to her husband's interests in a joint holding on a life tenure and is recorded as a joint owner in the Revenue papers, is entitled, as being "an owner" within the meaning of Section 111 of the Punjab Land Revenue Act, 1887, to apply for partition before a Revenue Officer, who has a discretion to either grant or refuse her prayer, it is open to the co-sharers, in the event of her prayer being so granted, to seek relief in the Civil Court on the ground that the widow was by custom not entitled to claim partition, such objection on their part raising a question of title in the land sought to be partitioned and therefore giving the Civil Court jurisdiction to entertain the suit.

Further appeal from the order of G. L. Smith, Esquire, Divisional Judge, Rawalpindi Division, dated 27th January 1898.

Ishwar Das, for appellant.

Jaishi Ram, for respondent.

The questions involved were referred to a Full Bench by the following order of the Division Bench (*Chatterji and Anderson, JJ.*):—

CHATTERJI, J.—The material facts are briefly these. Mus-sammat Jiwani, defendant-respondent, is the widow of plaintiff's uncle, Karam, deceased, and is recorded half sharer with plaintiff in a joint *khata* No. 164, containing 119½ *kansals* of land in Hafial. On 19th January 1897 plaintiff brought a suit against the defendant for a declaration that he was the sole proprietor

4th Augt. 1898.

of the holding on the ground that defendant had been divorced by her husband. His allegation was denied, but before issues were framed he on 8th February 1897 withdrew his claim, whereupon it was dismissed. Defendant then applied to the Revenue authorities for partition of the *khata* and plaintiff, on objecting, was referred to the Civil Court to establish his right. He has accordingly brought this declaratory suit alleging that defendant is not entitled to partition (1) by law and custom, and (2) by reason of an arrangement through a *jirga* by which she was assigned 2 *ghumraos* of land for her maintenance.

The first Court held that defendant had no right to claim partition and granted plaintiff the decree he sought. On appeal the Divisional Judge held that plaintiff had not proved that he was entitled to prevent defendant from getting partition and dismissed the suit. The plaintiff appeals and two points are raised on his behalf, (1) that the arrangement through *jirga* set forth in the plaint bars her claim to partition and should have been enquired into, (2) that she has no right by law or custom to demand partition. Several rulings of this Court are quoted in support of the latter contention.

As regards the first point, it is feebly put forward in the plaint, and the 4th ground of appeal which is supposed to cover it is feebler still. It does not appear to have been raised in the Lower Appellate Court. The appellant was no doubt respondent in that Court, but the Judge has fully noticed all the points raised on his behalf, and it is incredible that he should omit to refer to such a point if it was at all pressed before him. Appellant has thus no right to claim an inquiry into it, and, having regard to the form in which it is raised in this Court and the probabilities, particularly the allegations made in the former suit, we do not think it is necessary in the interests of justice to direct an inquiry into the question at this stage.

With reference to the second point there are numerous rulings of this Court from 1868 to 1881 which lay down that a Hindu or Muhammadan widow in the Punjab governed by customary law succeeding to her husband's share in joint property in land is not entitled to demand partition before the Revenue authorities but only to separate possession where it is indispensable to secure her the proper enjoyment of such share. But since those decisions were passed a new Revenue Act has been enacted. In No. 11, *Punjab Record*, 1895, Revenue, the Financial Commissioner of the Punjab held that the widow recorded as a sharer in a joint holding is a "landowner" under that Act and as such is entitled to claim partition, and that her

right to obtain it is only controlled by the discretion of the Revenue Officer under Section 115 to grant it or not. If this view is correct it would seem that the Civil Court cannot give a declaration that she is not entitled to obtain partition. By Section 158 (1) the jurisdiction of the Civil Court to interfere in any matter which a Revenue Officer is empowered by the Act to dispose of, or to take cognizance of the manner in which the power is exercised is taken away. In regard to partition the only questions within its cognizance are questions relating to title in the property of which partition is sought. Mr. Ishwar Das contends that the question raised by the appellant as to the widow's right to demand partition of her share before the Revenue authorities is, under the authoritative declarations of the law and custom in the rulings of this Court cited by him, one regarding her title. We are disposed at present to think that this is a rather strained interpretation of the word "title," the expression used being "title in any of the property." If this interpretation is correct the Financial Commissioner's view is wrong.

It must be held for purposes of this case that by reason of the dismissal of plaintiff's former suit the defendant is the undisputed successor to her husband's interest in the joint holding on a life tenure, and she is so recorded in the revenue papers.

Considering the importance of the subject, the question whether the new Land Revenue Act has effected any change in the law relating to partition and made the rulings of this Court in regard to the widow's right to claim partition while the previous Act was in force inapplicable should be referred to, and decided by a Full Bench. The Financial Commissioner's judgment appears to put his view of the law very clearly and forcibly.

We accordingly refer the following questions, and, to save the parties unnecessary trouble, the whole case, to a Full Bench—

- (1) Whether a suit of this description lies after the enactment of Act XVII of 1887?
- (2) Whether the question raised by the plaintiff is a question as to title in the property of which partition is sought.

The judgment of the Full Bench was delivered by

CHATTERJI, J.—The facts of the case appear from the order 24th Jany. 1899. of reference.

The questions before this Full Bench are two—

- (1) Whether a suit of this description lies after the enactment of Act XVII of 1887 ;
- (2) Whether the question raised by the plaintiff is a question relating to title in the property of which the partition is sought.

The second question may be dealt with first, for our reply to the first will in a great measure, if not wholly, depend on our decision on it.

The point ruled by the Financial Commissioner in No. 11 of 1895, Revenue, is that the widow of a landholder in the Punjab succeeding to a joint share in land belonging to her husband and duly recorded in the revenue papers is entitled to claim partition from her co-owners. This view was approved in No. 6, *Punjab Record*, 1896, Revenue. In neither case had the Financial Commissioner before him the precise points we are now considering. He held that a widow was entitled to claim partition under the existing Revenue Law, *viz.*, Section 111 of Act XVII of 1887, but we do not understand him to lay down that, given the facts that the widow's right to the joint share is admitted, and that it is duly entered in the Revenue Records, her right to claim partition is indefeasible by law so far as the other sharers are concerned, and subject only to the Revenue officer's discretion to grant it or not. He has only considered the question from the Revenue officer's point of view and had not to decide the right of the other co-sharers to object to the partition in the Civil Court, nor, if we understand him aright, has he decided it. It would seem, therefore, that if we held that the widow's claim is liable to be defeated by the objections of the male co-owner there would not necessarily be any conflict between his opinion and ours.

We agree with Financial Commissioner that a widow under the circumstances mentioned in his judgment is able to ask the Revenue officer for partition of her share under Section 111 of the Punjab Land Revenue Act. But we do not think there is any thing in that section read with the other relevant sections of the Act, *e.g.*, Sections 116 and 158, Clause (xvii), to show that her right is controlled only by the discretion of the Revenue officer. We are also unable with all deference to the learned Financial Commissioner to hold that the right is given to the widow because she is a "landowner" under Section 3 (2), though this argument was pressed before us with great force by respondent's counsel. The word used in Section 111

is "owner" not "landowner," and in our opinion the two terms are not synonymous. "Landowner" has a very wide signification and includes many persons whose interests in land are of a limited or ephemeral character, *e. g.*, a farmer or transferee for revenue purposes or one, not expressly mentioned in the clause, who is in possession of an estate or any part thereof or in the enjoyment of any part of the profits of an estate. Had it been used in Section 111 there would have been some ground for the contention that the widow's right to partition is indefeasible, for at all events her interest is much larger than that of the persons mentioned above.

The word "owner" has not been defined in the Act, and according to the accepted canons of interpretation we must, unless the context negatives such a construction, take it to have been used in its ordinary sense. Now the connotations of the term are somewhat indefinite, and it is commonly applied to persons whose rights in property are unlimited as well as those whose rights are more or less restricted. In its widest signification to use the language of Austin ownership means a "right over a determinate thing indefinite in point of time, unrestricted in point of disposition and unlimited in point of duration." The component rights of ownership fall under three heads, possession, enjoyment and disposition (*per* Sir M. Plowden, C. J., in No. 107, *Punjab Record*, 1887, page 246).

In actual life we do not always find the rights of ownership uncontrolled under all the three heads. The obligation to respect the rights of others and the restrictions imposed by law frequently limit the power of the owner to deal with his property. The right is widest in respect of movable and acquired immovable property, but in the Punjab among agriculturists custom does not allow the male owner in possession an unrestricted right of alienation of ancestral land to the prejudice of his male heirs. But though thus possessing a limited power of transfer for legal necessity he is all the same termed an owner in common parlance. As respects acquired land as well as ancestral land he is equally described as owner. The same remark applies to a widow succeeding to her husband's estate on a customary tenure. She is not strictly a life tenant, but her rights of alienation are restricted like that of the male holder as regards ancestral land, and the conditions constituting legal necessity are more stringent in her case. But she is also called an owner in the revenue records and in the language of common life. The word "owner" is thus ordinarily applied indiscriminately to persons having rights in property which are

in some cases plenary and in others restricted, and this must be understood to be the sense of the word in Section 111. A widow therefore is an owner, and in this case a joint owner under that section.

We have discussed this point at some length as one of Mr. Ishwar Das' arguments was that the word does not include such rights as a widow possesses in her husband's land to which she has succeeded for life.

As the defendant's widow is an "owner," it follows that she could apply for partition before a Revenue officer who, as such, was bound to grant her prayer unless he disallowed it in the exercise of his discretion, which he did not do. Plaintiff's objection that she is not entitled to claim partition by custom would avail and the Civil Court would have jurisdiction to give him relief only if the objection can be held to raise a question of title in the land sought to be partitioned.

After giving the matter our best consideration we are of opinion that the answer to this question must be one in the affirmative in favour of the plaintiff. The word "title" is sometimes synonymous with right and sometimes the correlative of it. A person who has a particular right in property is said to have a title in it. Thus a man who has the right to hold and cultivate certain land is said to have a title to it as a tenant. Partition is one of the modes of use and enjoyment of land held in joint ownership and the right of partition is a right appurtenant to ownership. It is possible to conceive of an owner who has not the right to demand partition, just as there are many who have not the right of unrestricted disposition. In such a case the limitation or defect is in the title of the owner. The plaintiff's contention that the defendant's widow has not by custom the right to demand partition of the property in dispute therefore amounts to an assertion that her title as owner is restricted in that respect. It therefore raises a question of title in the property sought to be partitioned.

This appears to have been held in several previous decisions of this Court in analogous cases. In No. 63, *Punjab Record*, 1892, the claim of a female holder of land to partition was opposed on the ground that she had by a private *rasinama* accepted an allowance of grain, and that the plaintiff had therefore sunk a well and made improvements on the land, and it was held that the objection related to a question of title. In No. 82, *Punjab Record*, 1893, an objection that certain land was not liable to partition without the concurrence of all the sharers was held to

be one of this character. We also agree with the learned Judges who decided the latter case that the two descriptions of questions which can possibly arise when partition of land is sought before a Revenue officer, and which are given in Section 116 of the Punjab Land Revenue Act, are meant to be exhaustive and mutually exclusive, and this furnishes another argument in support of the view we are now taking.

As regards the first question, which had reference to Section 158, our answer is governed by our reply to the second. As the objection raises a question of title, we hold that the suit is maintainable in the Civil Court.

The above disposes of the questions referred to the Full Bench. But the whole case has also been referred to it, and we accordingly proceed to pass final orders.

There is no contention raised before us that the widow's right to partition is not restricted by custom, as was laid down in the previous rulings of this Court. As the plaintiff's suit is now held to be maintainable we think he must be granted the declaratory decree he asks for. Defendant would no doubt be entitled to claim separate possession of her share in the Civil Court without partition if she cannot otherwise conveniently and comfortably enjoy its usufruct, but she has actually made no claim of this kind, and we can therefore only leave this expression of opinion on record.

We accept the appeal and decree the plaintiff's claim without prejudice to defendant being allowed separate possession and enjoyment of her share by the Civil Court on her making out a case for such relief.

Parties will bear their own costs throughout.

Appeal allowed.

No. 83.

Before Mr. Justice Reid.

SUNDER SINGH,—(PLAINTIFF),—APPELLANT,

Versus

JIWAN RAM,—(DECREE-HOLDER),—AND MUSSAMMAT
LACHMI,—(DEFENDANTS),—RESPONDENTS.

} APPELLATE SIDE.

Case No. 779 of 1898.

Civil Procedure Code, 1882, Sections 274, 276—Validity of attachment.

On the 8th October 1888, the decree-holder applied for execution of his decree by attachment and sale of the whole of the judgment-debtor's immovable property, and the report of the attaching officer was that attachment had been effected on the 22nd October 1888 by beat of drum on the

spot and by affixing a notice, under Section 274 of the Civil Procedure Code, on the house of the judgment-debtor, situate on the spot. It did not, however, appear from the report that a copy of the notice was affixed in the court-house or in the office of the Collector of the District, and no evidence was adduced on this point. The plaintiff purchased the land in dispute from the said judgment-debtor on the 18th March 1891, and it was contended on his behalf that, in order to render the said sale to him invalid, the decree-holder was bound to prove that all the conditions of Section 274 had been duly complied with. It was proved that there had been litigation about the attachment before plaintiff's purchase, and that the latter's sale-deed was executed at Lahore, and not at Amritsar, where it would ordinarily have been executed.

Held, having regard to the circumstances of the case, that plaintiff had notice *aliunde* of the attachment, and that there was no reason to hold that the condition of Section 274 had not been complied with, or, in any case, that the attachment was not valid as against plaintiff.

The rule laid down in *I, B. L. R. (S. N.), 23*, and *I. L. R., II All., 58* should not be strictly applied in this Province.

Further appeal from the order of J. A. Anderson, Esquire, Divisional Judge, Amritsar Division, dated 21st April 1898.

Lajpat Rai, for appellant. •

Birch, for respondent.

The judgment of the learned Judge in Chambers was as follows :—

13th Jany. 1899.

REID, J.—The question for consideration is whether the land in suit was under attachment, in execution of the respondent-decree-holder's decree, on the 18th March 1891, the date of its sale to the appellant by the judgment-debtor. On the 8th October 1888, the decree-holder applied for execution of his decree by attachment and sale of the whole of the judgment-debtor's immovable property, and the report of the attaching officer was that attachment had been effected on the 22nd October 1888 by beat of drum on the spot and by affixing a notice under Section 274 of the Code of Civil Procedure on the house of the judgment-debtor, situate on the spot. It does not appear from the report that a copy of the notice was affixed in the Court-house, or in the office of the Collector of the District, and no evidence has been adduced that the notice was so affixed.

For the appellant it is contended that the respondent was bound to prove that all the conditions of Section 274 had been complied with, in order to render the sale to the appellant invalid under Section 276 of the Code.

Indra Chandra Babu v. Agra and Masterman's Bank (I, B. L. R. S. N. 20) and *Nur Ahmad v. Altas Ali (I. L. R., II All., 58)* support this contention.

The pleader for the respondent relies on an unreported ruling of a Bench of this Court, in Civil Appeal 1348 of 1892, in a suit by a judgment-debtor to recover a house sold in execution of a decree against him, on the ground of certain irregularities in the sale, including failure to affix a copy of the notice under Section 274 in the Court-house or Collector's Office.

It was held that such failure did not invalidate the sale, the material conditions of Section 274, so far as the judgment-debtor was concerned, being the proclamation on the spot and the service of a notice on him. This obviously distinguishes the case from those quoted for the appellant, which were between attaching creditor and purchaser, but it was remarked in the judgment that the practice in the Jullundur District appeared to be for the copy of the prohibitory order intended for the Court-house to be kept with the file. The present case is from the adjoining District, Amritsar, and the practice in this Province appears to be very loose.

It is further argued for the appellant that the Revenue records prove that the decree-holder consented to the release from attachment of all but 25 *bighas* of land, which did not comprise the land in suit. This does not appear to be the case, an apparently unencumbered plot of land being selected for sale, as sufficient to satisfy the decree, but the attachment thereof being eventually set aside on the objection of a third person, who had purchased from the judgment-debtor before the 22nd October 1888. There is ample authority for holding that these proceedings had not the effect of releasing the rest of the property from attachment, and the fact that the decree-holder subsequently applied for fresh attachment of the land in suit does not deprive him of the benefit of the original attachment.

It appears that the property was encumbered, and that a larger area than would otherwise have satisfied the decree was consequently attached. The whole property being attached, the proceedings were not invalid by reason of the numbers of the fields not being specified.

The ruling of their Lordships of the Privy Council, in *Ramkrishna Das Surrouji v. Surf-un-nissa Begum* (I. L. R., VI Cal., 129) is in point, in so far as their Lordships expressed a doubt as to whether it was not for the party who relied on non-observance of due formalities in attachment to prove it, but is not in point as regards the respondent's plea that objections on the ground of such non-observance are too late, the present suit being based on the ground that no valid attachment was effected.

Having regard to the circumstances of this case, I do not think that the rule laid down in 1, B. L. R. and I. L. R., II 44, should be strictly applied here.

It does not appear from the reports of those cases that the purchaser had notice *abunde* of the attachment, and I have no doubt that the appellant had notice. There had been litigation about the attachment before the appellant purchased, and his sale-deed was executed at Lahore, instead of at Amritsar, where it would ordinarily have been executed.

There was apparently no serious suggestion, when the method of attachment was fresh in the memory of those who could prove it, that all the conditions of Section 274 had not been complied with, and I see no reason to hold that the conditions of the section were not complied with, or in any case to hold that the attachment was not valid as against the appellant.

The appeal fails and is dismissed with costs.

Full Bench.

No. 84,

Before Mr. Justice Clark, Chief Judge, Mr. Justice Chatterji
and Mr. Justice Anderson.

HARVANS SINGH,—(PLAINTIFF),—APPELLANT,

Versus

HARNAM SINGH AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

Case No. 759 of 1897.

Custom—Alienation—Suit by son in presence of his father to contest an alienation by an agnate—Locus standi of plaintiff—Sodhi Khatri of Tahsil Zira, Ferozapore District.

In a suit by plaintiff to contest an alienation by his father's uncle, it appeared that plaintiff's father was alive, but refused to join in the suit. The question referred to the Full Bench was whether, under such circumstances, plaintiff had any *locus standi* to sue.

Held, that under Customary law by which the parties were governed, plaintiff was entitled to sue to set aside the alienation in question, and that the District Judge had erred in dismissing his suit on the ground that he had no *locus standi*.

First appeal from the order of Maulvi Muhammad Husain, District Judge, Ferozapore, dated 1st April 1897.

Oertel, for appellant.

Sham Lal, for respondents.

APPELLATE SIDE. }

The judgment of the Full Bench was delivered by

CHATTERJI, J.—The material facts are stated in the order of reference. Harnam Singh, the alienor is the grandson of the common ancestor, Chanan Singh, while plaintiff is Chanan Singh's great-grandson's son. Sundar Singh, plaintiff's father, is alive, but will not join in the suit to contest his uncle's alienations, though the District Judge finds that this is not shown to be due to collusion. 27th Jany. 1899.

The question before the Full Bench is, has plaintiff a *locus standi* to sue to set aside the alienations ?

We are of opinion that the answer should be in the affirmative. Plaintiff as a remote reversioner would be able to sue in the presence of a nearer reversioner if the latter colluded with the alienor or was a person with limited rights or had consented to, or acquiesced in, the alienation or refused to sue without sufficient cause, as plaintiff's father has done in the present case. Does the fact that the nearer reversioner here is the plaintiff's father make any difference ? Whatever might be the consequence if Hindu law applied,—a point we do not decide—we consider that under Customary law this would not affect the plaintiff's right of action. Plaintiff is in the line of heirs to Harnam Singh, though his father would precede him in the succession if he was alive when it opened out. Plaintiff thus has an interest in the property which is apparent at the time of suit, and as his father will not take any steps to protect the reversion, there is no good reason why plaintiff should not, under the general rule above cited, come forward to save that right for himself. Moreover, the right to inherit land and the right to protect that land from improper alienation do not stand on exactly the same footing under Customary law. The former is derived through the immediately preceding ancestor, but the latter is a right which accrues to every descendant of the original holders of the land. To use the language of Sir Meredyth Plowden in No. 107, *Punjab Record*, 1887, F. B., "there exists some sort of residuary interest in all the descendants of the first owner or body of owners, however remote and contingent may be the probability of some among such descendants ever having the enjoyment of the property." This is the prevailing sentiment among the agricultural tribes in this Province, and forms the bed rock on which the right of agnates to restrict improper alienation ultimately rests.

In this connection the distinction drawn between the right to possession and the right to sue for possession in page 79 of the

Full Bench Judgment, No. 18, *Punjab Record*, 1895, and the reasons given therefor are instructive and may be consulted with advantage. Some of the reasoning would by way of analogy apply to the present discussion.

If Sundar Singh had transferred some of the ancestral land in his own possession without necessity, there is no doubt plaintiff would have been able to sue to protect his reversionary rights. By parity of reasoning he should be able to intervene when Sundar Singh allows his rights of reversion in Harnam Singh's land to be placed in jeopardy by permitting Harnam Singh's alienation to pass without challenge.

It is contended for the respondents that the parties here are Sodhi Khatri and governed by Hindu law, from which therefore the rule of decision should be deduced. But the reference is made under Customary law, and the answer of the Full Bench must be framed accordingly. Moreover, custom is the primary rule of decision in a matter of this kind under the Punjab Laws Act. The parties never set up Hindu law as governing them and they are land-holding Sikh Khatri in a village in the Muktsar *tahsil* of the Ferozepore District. In No. 50, *Punjab Record*, 1895, it was found that Sodhi Khatri of that district were governed by custom and a childless male proprietor was held to be precluded from alienating ancestral land without necessity. We see no reason to take a different view, nor can the point be raised at this stage.

The whole case has been referred to the Full Bench, and in accordance with our opinion stated above, we hold that the District Judge has wrongly decided that plaintiff had no *locus standi* and dismissed his claim. The case must be heard and decided on the merits.

We accept the appeal under Section 562, Civil Procedure Code, and return the case to the Court below for a fresh decision with reference to the above remarks. Court-fee on the petition of appeal will refunded. Other costs will abide the event.

Appeal allowed: cause remanded.

No. 85.

*Before Mr. Justice Clark, Chief Judge.*LALA DHOLAN DAS AND ANOTHER,—(PLAINTIFFS),—
PETITIONERS,*Versus*

RALYA SHAH,—(DEFENDANT),—RESPONDENT.

} REVISION SIDE.

Case No. 1738 of 1898.

Provincial Small Cause Court Act, 1887, Section 25—Revision—Wagering transaction—Written contract—Admissibility of evidence to prove that contract was void under Section 30 of the Contract Act—Evidence Act, 1872, Section 92.

The Judge of the Small Cause Court dismissed plaintiffs' suit on the ground that the evidence proved that the written agreement sued upon, which purported to be one for sale of silver, was not a *bond fide* transaction, no actual interchange of silver being contemplated, but merely an adjustment of profit and loss with reference to a difference in the market rates. Plaintiffs applied to the Chief Court for revision of the order of dismissal on the ground, (1) that there was no evidence to show that delivery of silver was not intended, and (2) that oral evidence was inadmissible to contradict the terms of the written agreement according to which silver was to be delivered.

Held, that as there was evidence on which the Judge of the Small Cause Court might base his finding that the transaction was a wager, that finding should not be disturbed on revision.

Held, further, that the oral evidence was admissible, under the first proviso to Section 92 of the Evidence Act, for the purpose of invalidating the written agreement.

I. L. R., XVII Mad., 480, and I. L. R., XII Bom., 585, followed; I. L. R., IX Calc., 791, not followed.

Petition for revision of the order of Lala Ram Nath, Judge, Small Cause Court, Amritsar, dated 1st July 1898.

K. P. Roy, for petitioners.

Lal Chand, for respondent.

The facts of the case appear from the judgment of the learned Chief Judge, which was as follows :—

CLARK, C. J.—The plaint in this case was that on 13th 25th Jany. 1899. September 1897, defendants sold a case of silver 2,800 *tolas* in weight to plaintiff, at Rs. 71 per 100 *tolas*, for delivery on 20th or 21st September, and executed a *satta* to that effect.

Defendant did not deliver the silver, and as silver was selling at Rs. 81 per 100 *tolas* on 21st September 1897, plaintiffs claimed the difference of rates amounting to Rs. 280.

Defendant pleaded that this was a wagering transaction, and that he was not liable.

The Judge, Small Cause Court, fixed issues :

Whether the contracts on *satta* for sale of silver were *bona fide* transactions, or of a wagering character.

Plaintiffs had eight similar suits against different persons and they were all decided by the present decision.

The Judge, Small Cause Court, found "on the facts and evidence on the record, I am of opinion that no actual interchange of silver was contemplated in the contracts in dispute, but that only an adjustment of profit and loss with reference to the market-rate of the goods was intended, and this fact renders the contracts void within the meaning of Section 30 of the Contract Act," and dismissed the suits.

Plaintiffs have applied to this Court for revision on the grounds—

- (1) That there was no evidence on which to come to the conclusion that delivery of the silver was not intended.
- (2) That oral evidence was not admissible to contradict the terms of the *satta* according to which the silver was to be delivered.

The first question that arises is whether a revision lies in this case.

The law as stated in *I. L. R., XVIII Mad., 306*, is clear that agreements between buyers and sellers of shares and stocks to pay or receive the differences between their prices on one day and their prices on another day are gaming and wagering transactions, and in India are void under Section 30 of the Contract Act.

There is no difference where the subject of the bargain is silver instead of shares or stock. The essential point is that in agreements by way of wager there is no intention at the time when they are made to sell or deliver, but only to speculate and pay the difference.

The Munsif in this case made a long investigation, examined both parties and such witnesses as they chose to produce, including the broker who effected the transaction between the parties and other persons who had been making silver bargains about the same time. The evidence in this case was similar in its kind to the evidence on which the Judges in *I. L. R., XVII Mad., 489*, and *XVIII Mad., 306*, decided that a transaction was a wager.

I am of opinion, therefore, that there was evidence on which the Judge, Small Cause Court, might base his finding that the

transaction was a wager, and that that finding should not be disturbed on revision.

The next question is whether any evidence should have been admitted to contradict the terms of the *satta*. Mr. K. P. Roy, for plaintiffs, relies upon *I. L. R.*, *IX Cal.*, 791. That judgment was considered in *I. L. R.*, *XVII Mad.*, 480, and it was held agreeing with *I. L. R.*, *XII Bom.*, 585, that under Proviso 1, Section 92, of the Evidence Act, oral evidence was admissible to prove any fact that would invalidate a document, and that it was for that purpose that oral evidence had been tendered and admitted in that case.

I think here also the oral evidence was admitted to invalidate the *satta*, and that it was admissible for this purpose.

If such evidence were excluded parties would be able, by drawing up a *satta* like this one, to defeat the whole provision of the law as to wagers.

Cases are quoted on page 433, Field's Law of Evidence, 5th Edition, which support the view taken by me.

I hold then that no revision lies and dismiss the petition with costs.

Application dismissed.

No. 86.

Before Mr. Justice Clark, Chief Judge.

MUHAMMAD HUSAIN,—(VENDOR-DEFENDANT),—
PETITIONER,

Versus

ABDUL RAHMAN AND ANOTHER,—(PLAINTIFFS),—AND
MUHAMMAD HUSSAIN,—(VENDOR-DEFENDANT),—
RESPONDENTS.

} REVISION SIDE.

Case No. 1180 of 1898.

Appeal and cross-objections—Power of appellant to defeat cross-objections by withdrawing from appeal—Case remanded to lower Appellate Court under Section 562, Civil Procedure Code—Default of appellant—Proper order for lower Appellate Court to pass.

The first Court having decreed plaintiffs' suit for pre-emption at Rs. 492, plaintiff appealed to the Divisional Court as to the price, and defendant cross-objected that plaintiffs' suit had not been filed by a duly qualified agent. The Divisional Court dismissed the suit on the latter ground, whereupon plaintiffs appealed to the Chief Court, which remanded the case to the lower Appellate Court, under Section 562 of the Civil Procedure Code, for decision as to whether plaintiff's alleged agent had been duly authorised to institute the suit, and for disposal of the appeal if the suit

were found to be within limitation. At the date fixed for hearing on the remand, plaintiff failed to appear, whereupon the lower Appellate Court passed an order to the effect that the appeal must be dismissed for plaintiff's default, and that, therefore, defendant's cross-objection failed, and could not be entertained.

Held, that inasmuch as the case had been remanded by the Chief Court merely in order to give plaintiff an opportunity of proving that his alleged agent was duly authorized to institute the suit, the lower Appellate Court should have held, on plaintiff's default, that the previous order of the Divisional Court stood.

Held, further, that when once an appeal has come to a hearing, the Court is seized of the appeal, and an appellant cannot in such a case defeat a cross-objection by withdrawing from the appeal.

Petition for revision of the order of S. Olifford, Esquire, Divisional Judge, Delhi Division, dated 25th March 1898.

Muhammad Shafi, for petitioner.

Oertel, for respondents.

The judgment of the learned Chief Judge was as follows :—

30th Jan'y. 1899.

CLARK, C. J.—The first Court decreed for pre-emption at Rs. 492. Plaintiff appealed as to price, and defendant cross-objected as to plaintiff's suit not having been regularly filed.

Divisional Judge dismissed plaintiff's suit on the ground that the plaint had not been presented by a duly qualified agent.

The Chief Court on plaintiffs' appeal said that plaintiffs should be given an opportunity to prove that his agent, Faiz Muhammad, had been duly authorized to institute the suit, and remanded the case under Section 562, Civil Procedure Code, for decision of this point, and for disposal of the appeal if the suit is found to be within limitation.

The Divisional Judge has passed the following order :—“ As the appellants are not present and the appeal must be dismissed the cross-objection cannot be entertained.

“ The appeal is accordingly dismissed for default with costs, and the cross-objection fails.”

Defendant has applied for revision of this order, and this is the case now before me.

I think that the Divisional Judge has misunderstood the order of this Court, which was to the effect that if plaintiff proved that the agent had been duly authorized to present the plaint, in that case he was to dispose of the appeal.

As plaintiff did not prove the issue which he was required to prove, I think the Divisional Judge should have held that the previous order of the Divisional Judge stood.

The question arises whether the cross-objection could be entertained in default of appellant-plaintiff. For defendant *I. L. B.*, IX Bom., 38, XXIII W. R., 229, are relied upon; and for plaintiff, XXIII W. R., 575, *I. L. B.*, XVII All., 518; *Punjab Record*, No. 53 of 1896.

After considering these authorities, I hold that when once an appeal has come on to hearing the Court is seized of the appeal, and appellant cannot defeat the cross-objection by withdrawing from the appeal.

In this case the Divisional Judge had actually dismissed the suit on defendant's cross-objection.

It is urged for plaintiffs that the remand under Section 562 had the effect of renewing the appeal, and gave plaintiffs the right to withdraw from the appeal and prevent the hearing of cross-objection.

I do not think that the remand under Section 562, Civil Procedure Code, had this effect; it threw the burden on plaintiff of proving a certain matter, and if he defaulted in that, he was to be in no better position than he was before he appealed to the Chief Court.

I accept this revision, and direct that the decree of the Divisional Judge of 19th June 1895 shall stand.

Plaintiff will bear all costs subsequent to the decree of this Court of December 9th, 1897.

Application allowed.

No. 87.

Before Mr. Justice Chatterji and Mr. Justice Robertson.

HAKIM AND OTHERS,—(DEFENDANTS),—APPELLANTS,

Versus

JAGAT SINGH AND ANOTHER,—(PLAINTIFFS),—
RESPONDENTS.

} APPELLATE SIDE.

Case No. 1430 of 1897.

Custom—Succession—Issue of woman whom a man could not legally marry, but treated by him as his wife—Varaich Hindis Jats of tahsil Gujranwala—Riwaj-i-am.

Found, that no custom had been proved amongst Varaich Hindu Jats of Gujranwala tahsil whereby, when a proprietor has throughout his life lived with a woman whom he could not legally marry and has treated her as his wife and his sons by her as ordinary sons, such sons succeed to his estate on his death.

Further appeal from the order of Sardar Gurdial Singh, Man, Divisional Judge, Sialkot Division, dated 16th February 1897. Lal Chand, for respondents.

The judgment of the Court was delivered by

10th Feby. 1899.

ROBERTSON, J.—This case was remanded by Sir Charles Roe and Mr. Frizelle, Judges, for enquiry regarding a point of custom. It appears that Attar Singh, plaintiff's brother, lived for many years with *Mussammatt Bhagan* as husband and wife. *Mussammatt Bhagan* was a Mussalman, and Attar Singh himself did not, from a legal point of view, become a Mussalman until a year or so before his death. The Bench of this Court in their order of April 21, 1898, found as a fact that Attar Singh remained a Hindu Sikh until 1891, and that there could be no lawful marriage between a Sikh and a Mussalman. It also noticed the Muhammadan law of acknowledgment, pointing out that it does not cover the case of a man who desires to make an adoption by declaring another man's son to be his, nor does it enable a man to set at naught the marriage law by declaring that the offspring of a marriage which the law forbids is legitimate.

It was found as a fact that *Mussammatt Bhagan* had been treated as a wife and the sons, defendants, as ordinary sons. It was therefore considered that the real question is, "Is the "*Riwaj-i-am* correct in stating that by custom the sons are "entitled to succeed." The case was, therefore, remanded for further enquiry, and the issues stated thus:—

"Amongst the *Varaich Hindu Jats* of the *Gujranwala* "*tahsil*, when a proprietor has throughout his life lived with "a woman whom he could not legally marry, and treated her "as his wife and has treated his sons by her as ordinary sons, "do these sons by custom succeed to his estate on his death?"

To this remand a return has now been received.

The actual entries in the *Riwaj-i-am* are as follows:—In that prepared in 1668, Q 6, the entry states that illegitimate children of a woman with whom a marriage would have been possible do not succeed, but may receive a gift accompanied by possession during their father's life-time. In answer to Q 7, the same answer is given regarding the children of women with whom marriage would have been unlawful. Under this second question a case of succession which occurred by illegitimate sons of a Mussalman woman is given as an exception: this occurred in the case of *Sahib Ditta's* descendants in *Mauza Mari*, a case quoted by the Lower Court, as will be noticed below.

In the *Riwaj-i-am* of 1891-92, under Q 76, the question is, "When a marriage has taken place which, on account of relationship, or former marriage, or difference in caste (Jat), etc. (wagairab), or for any other cause, was not lawful, "is the offspring of such union to be held legitimate or not"? The answer is that the offspring are to be considered illegitimate, but are to inherit an equal share with legitimate offspring. This entry, it will be seen, is different from the entry of 1868.

The case was sent to the Additional District Judge of Gujranwala, who appointed the four *Tahsildars* of the District as Commissioners to report as to the existence or the contrary of the custom set out in the issue referred. The *Tahsildar* of Gujranwala called together a number of *saildars* and *lambardars*, and reports that opinion was against the existence of such a custom, and to the effect that if a *Varaich* Sikh married a *Mussalman* her children would not succeed. The *Naisb-Tahsildar* of Hafizabad, after collecting a number of *lambardars*, etc., makes the same report. There are no *Varaich* villagers in this *tahsil*. *Tahsil* Khangah Dogran is made up of new canal settlements, and was not a useful field for enquiry, but the *Naisb-Tahsildar* makes the same report as above, but notes that one of the *lambardars* called mentioned a case in Amritsar *tahsil* where a son of a *Mussalman* wife by a Sikh succeeded to something from his father. The *Tahsildar* of Wazirabad, in which are no *Varaich zamindars*, also reports against the existence of the alleged custom. A *lambardar* mentions the case of one Joga, who had a *Mussalman* woman living with him, whose child was not allowed to succeed. The Additional District Judge, Khan Ahmad Shah, however, himself reports in favour of the custom, giving eight illustrations. In regard to these, it was pointed out by the respondents' counsel, that in the first case, that of one Ram Singh who married *Musammam* Umar Bibi, it appears from Buta's own statement, Buta being the son who succeeded, that before Buta was born, his father had turned *Mussalman*. The second case in *Mauza Shama* was clearly a case of gifts followed by possession. The third case, that of *Sahib Ditta* in *Mari*, is actually given as an exception, in the old *Riwaj-i-am*, to the rules then existing. The fourth is a case of *Mauza Lohianwala*; one Sham Singh had two wives, a Hindu and a *Mussalman*. Hira Singh was born of the Hindu wife, and Ladda, Haka, Arura were born of the *Mussalman* wife. The children succeeded together according to the *pagwand* custom some 30 years ago. This village is only one mile from defendants' village. The Lower Court reported in favour of the

custom, and we have now to consider whether it can be held to be established or not.

Recent decisions of this Court, notably 33 of 1896 and 73 of 1897, have gone some distance in the direction of supporting custom proved to exist whereby the children of connections not commenced by formal marriage ceremonies have been held entitled to succeed to their father's estate. In these cases, however, it has rather been the view that cohabitation and the treatment of the woman by the man in all respects as a lawful wife, and the treatment of the children by their father in all respects as his lawful children, takes the place of the marriage ceremony, and does in fact by custom constitute a marriage, and that such a view tends rather to morality than immorality on the whole, which has led to the upholding of the rights of the children to succeed. It is, however, a great step further to hold that a connection by cohabitation between a man and a woman between whom marriage is, to their own knowledge throughout, distinctly unlawful, is to give a full right of succession to illegitimate children. We are not to set up an abstract code of morals to be followed by agricultural Sikhs, but we are distinctly obliged to recognize as such, and to refuse to accept as proved, any custom which is obviously and clearly immoral, and when it is sought to prove the existence of a custom regarding inheritance which is at least of very doubtful morality, it is necessary to scrutinize the proof of its existence very carefully, and it must not be found to be binding if contrary to justice, equity, or good conscience. The decision that the offspring of the cohabitation of a Sikh man and a Mussalman wife, who could have none of the rights of husband and wife towards each other, are to be held entitled to succeed to their father's estate as if they were legitimate sons can only be come to on the clearest evidence that this is in fact the custom, and we cannot find any such clear proof of custom in the file before us. The Additional District Judge has reported in its favour, but each one of the commissioners appointed reported against it, and out of four illustrations given three clearly are of no weight, and the fourth is an old and doubtful case, in regard to which it appears no opportunity for rebuttal was given to the other side. For these reasons we hold that it has not been proved that amongst Varaich Hindu Jats of the Gujranwala *tahsil* when a proprietor has throughout his life lived with a woman whom he could not legally marry and treated her as his wife and has treated his sons by her as ordinary sons, that such sons succeed by custom to his estate on his death.

We would remark further that the entry No. 76 in the *Riwaj-i-am* of Gujranwala seems to deal with a somewhat different state of affairs from that proved to exist in this case. It contemplates a marriage having taken place which for some reasons, such as those recited, subsequently proves to be no legal marriage. This entry, therefore, it would appear, does not accurately cover the case now before us, but refers to a somewhat different class of cases.

We reject the appeal with costs.

Appeal dismissed.

No. 88.

Before Mr. Justice Reid.

MOTI RAM,—(PLAINTIFF),—PETITIONER,

Versus

KAMMAN AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

} REVISION SIDE.

Case No. 1238 of 1898.

Pre-emption—Conditional decree—Payment of purchase money—Appeal—Decree of Appellate Court confirming decree of first Court, but silent as to time for payment of purchase-money.

The first Court granted plaintiff a decree for possession of certain land on payment by him of Rs. 300 within one month from the date of decree. Plaintiff appealed to the lower Appellate Court on the question of price and costs. The lower Appellate Court dismissed the appeal and concluded its judgment as follows:—"I observe that plaintiff admits not "having paid Rs. 300 into Court as directed by the 16th April 1898. This "should be taken into account by the lower Court in the event of plaintiff "now desiring to pay in the money. I have not thought it right to extend "in any way the time within which the plaintiff should have liberty to "deposit his money." Forty-eight days after the date of the latter decree plaintiff filed an application for revision in the Chief Court, but did not deposit the said purchase money or any part thereof.

Held, following *Rup Chand v. Shams-ul-Jahan* (I. L. R., XI All., 346), that inasmuch as the decree of the first Court had allowed one month for payment of the purchase money, and the appeal against that decree had been dismissed without any fresh period for payment being expressly allowed, the Appellate decree must be taken to have incorporated the terms of the original decree, that the period of one month allowed for payment must be calculated from the date of the Appellate decree, and that payment by the decree-holder within one month of that date would have been in time.

Under the circumstances of the present case, the Chief Court granted the decree-holder a further period of 14 days from the date of its order for such payment.

Petition for revision of the order of A. Kensington, Esquire, Additional Divisional Judge, Umballa Division, dated 17th May 1898.

S. P. Roy, for petitioner.

Jaishi Ram, for respondents.

The judgment of the learned Judge was as follows :—

20th Feby. 1899.

REID, J.—The plaintiff-petitioner sued for pre-emption of certain land on payment of Rs. 64-12-0, and obtained a decree for possession on payment of Rs. 300. He appealed to the lower Appellate Court on the question of price and costs, and his appeal was dismissed.

The judgment of the lower Appellate Court terminated thus: "I observe that plaintiff admits not having paid Rs. 300 "into Court as directed" (by the Court of first instance) "by the 16th April 1898. This should be taken into account by the lower Court, in the event of plaintiff now desiring to pay in the money. I have not thought it right to extend in any way the time within which the plaintiff should have liberty to deposit his money."

It is contended that the lower Appellate Court acted with material irregularity in directing the Court of first instance not to receive the purchase money if paid in after the decree of the lower Appellate Court had been passed, inasmuch as one month having been allowed by the Court of first instance, the decree-holder was entitled to pay in the money within one month of that decree being confirmed in appeal in the event of no time being fixed by the Appellate decree.

This contention has force.

Counsel for the petitioner relies on No. 10, *Punjab Record*, 1895, which approved *Rup Chand v. Shams-ul-Jahan* (I. L. B., XI All., 346), in which it was held that where the decree of the Court of first instance allowed one month for payment, and the appeal against that decree was dismissed, without any fresh period for payment being expressly allowed, the Appellate decree must be taken to have incorporated the terms of the decree of the Court of first instance, that the period of one month allowed for payment must be calculated from the date of the Appellate decree, and that payment by the decree-holder within one month was in time. The pleader for the respondent relies on an *obiter dictum* of Rivaz, J., in No. 67, *Punjab Record*, 1895, in these words: "If the Appellate Court considers the first Court's decree correct in all particulars, and upholds it in its integrity, the plaintiff will then probably find himself without remedy."

"But he takes this risk when he elects to appeal without depositing the full purchase money." The question discussed was not before the Court, and was purposely left open. The actual question for decision dealt with Sections 17 and 18 of the Punjab Courts Act, which were repealed before the suit with which I have to deal was filed. Other rulings of this Court, decided before the repeal of those sections, are not in point, and need not be referred to, although quoted for either side.

Punjab Record, No. 47 of 1898, ruled that the omission to pay within the time allowed was not cured by the silence of the decree as to the consequence of failure to pay, and does not help the petitioner. This case and No. 10, *Punjab Record*, 1895, were in execution of pre-emption decrees.

No authority opposed to the case in *XI All.* has been cited for the respondent except the *obiter dictum* in No. 67, *Punjab Record*, 1895, already referred to. The Allahabad case was decided by a Judge whose decisions in pre-emption cases carries great weight, and in it various authorities are cited in support of the view adopted. I have no hesitation in following it, and in holding that the petitioner was entitled to possession on paying the price fixed into Court within one month of the date on which the decree of the lower Appellate Court was passed.

It does not appear from the record that any attempt was made to pay the money into Court before the expiry of one month from the date of the decree of the lower Appellate Court, and the application for revision was not filed in this Court until the expiry of forty-eight days from that date.

Having regard to the fact that the petitioner, who is a petition-writer and has drawn up his petition extremely badly, probably considered it useless, in the face of the judgment of the lower Appellate Court, delivered on the 17th May 1898, to attempt to pay the price fixed into Court, and to the time which has elapsed since the date of the decree of the Court of first instance, I allow the petitioner fourteen days from this date for such payment. The other grounds taken in revision have no force. The parties will pay their own costs of this Court.

Full Bench.**No. 89.**

*Before Mr. Justice Clark, Chief Judge, Mr. Justice Chatterji
and Mr. Justice Gordon Walker.*

APPELLATE SIDE. {

KARAM DIN,—(PLAINTIFF),—APPELLANT,**Versus****SHARAF DIN,—(DEFENDANT),—RESPONDENT.****Case No. 456 of 1896.**

*Punjab Tenancy Act, 1887, Sections 53, 56, 60—Unauthorised alienation
of occupancy rights—Customary right of collaterals to object to alienation.*

*Held, by the Full Bench, that when an occupancy tenant has not
complied with the provisions of Sections 53 and 56 of the Tenancy Act, 1887,
by giving notice to the landlord of his intention to alienate or obtaining
the landlord's previous consent in writing, the alienee obtains no indefeasi-
ble title to the tenancy under the Act, such alienation being voidable under
Section 60 of the Act at the instance of the landlord, or by a collateral
under customary law if the collateral is able to establish the custom.*

*In considering whether such custom exists the Court may take into
consideration the custom applicable as regards alienations of proprietary
rights, a very strong inference arising from the existence of the custom in
the latter case that it exists also in the former case.*

*Further appeal from the order of A. Christie, Esquire, Divisional
Judge, Jhelum Division, dated 4th March 1896.*

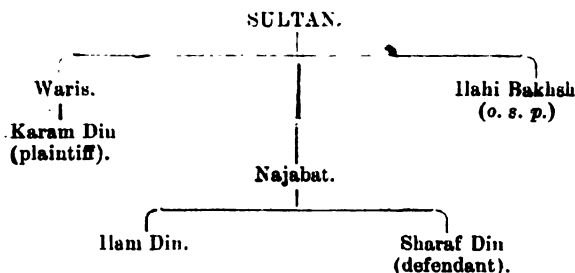
Sham Lal, for appellant.

Krishen Singh, for respondent.

*The questions involved were referred to a Full Bench by
the following order of the Division Bench.*

27th Nov. 1898.

GORDON WALKER, J.—The parties and the deceased Ilahi
Bakhsh whose estate is in dispute are related as shown below :—



The property in dispute is an occupancy tenancy, which
belonged to Ilahi Bakhsh and is now in possession of defendant
Sharaf Din, his nephew. Plaintiff Karam Din is the son of an-
other brother and claims to succeed to half of it. On the death
of Ilahi Bakhsh the landlord sued defendant contesting his

right to succeed, but the suit was dismissed on the ground that Sultan, the common ancestor, had occupied the land. In the present case defendant has set up an adoption and a deed of gift by the deceased.

The first Court decreed plaintiff's claim, holding that the adoption was not proved and that the gift was invalid. The Divisional Judge dismissed the suit of plaintiff on the strength of the ruling in *Punjab Record*, No. 68 of 1894, of which he quotes a portion. He perhaps failed to notice that that decision was under the old Act, and further in this case there has been no consent on the part of the landlord, so that the donee is certainly not "in possession by the act of the landlord."

In *Punjab Record*, No. 31 of 1896, which was a Full Bench ruling, the occupancy tenant had sold his rights to the landlord, and in that case it was held that a suit by collaterals to have the alienation declared of no effect as regards their rights as reversioners was not maintainable. That was the only point really involved, but the views expressed by all three learned Judges in their judgments in that case appear to have gone beyond what was necessary for its decision. Mr. Justice Rivaz, while pointing out that the question was not really before the Court, was of opinion that where an alienation takes place "unauthorised by the landlord, but unchallenged by him" (that is the present case) "it would be open to the heirs entitled to succeed "under Section 59 of the Act to question the alienation if they "could establish a custom giving them the right to do so in the case of "an occupancy holding." In my opinion there can be no doubt that it was at all events open to plaintiff in this case to challenge the gift made by the deceased in favour of one of his nephews to the exclusion of the other branch, and the present suit is maintainable. But the really important question is that suggested by the words italicised in the above quotation. The learned Chief Judge in his judgment remarked that the reversioners "would, however, have to prove that by custom they "could restrain the alienation, and it would not necessarily follow "that if the power of alienating ancestral property was restricted, "the power of alienating a tenancy would be equally so."

Section 59 (2) of the present Act provides that "as amongst . . . collateral relatives . . . the right shall . . . devolve as "if it were land left by the deceased in the village in which the "land subject to the right is situate." A very important question appears to be involved here, viz., whether the clause quoted just above merely indicates the line of succession in which the tenancy will devolve, or whether it has a wider meaning and puts the

succession to occupancy right (including the power to challenge any attempt to interfere with it where the landlord is not concerned) on the same footing as if they were proprietary rights in land. The latter was clearly not the view which the learned Judges were prepared to favour in *Punjab Record*, No. 31 of 1896, but their opinions on this point are the nature of *obiter dicta*, and it seems desirable to have an authoritative ruling on the point. It would in the great majority of cases be practically impossible to prove a custom restricting the power of alienation in respect of occupancy rights only and without preference to custom in respect of proprietary rights. The question comes to be this, must the field of inquiry as to custom in cases like the present one be limited to instances concerning occupancy rights, or does Section 59 (2) put questions that arise in connection with succession to occupancy rights on the same footing as those connected with succession to proprietary rights in land?

In view of *Punjab Record*, No. 31 of 1896, and the importance of the question, I think that the case might be referred to a Full Bench.

CLARK, C. J.—I agree to the above reference.

The following judgments were delivered by the learned Judges who constituted the Full Bench.

14th March 1899.

CHATTERJI, J.—The facts of this case and the points to be decided sufficiently appear from the order of Mr. Justice Walker.

I agree with Mr. Justice Walker that the opinions of the late Chief Judge, Sir Charles Roe, and Mr. Justice Rivaz expressed in their judgments in the Full Bench case No. 31, *Punjab Record*, 1896, to the effect that where an alienation of an ancestral occupancy right by the tenant is unauthorised by the landlord but is not contested by him it is open to the collaterals of the tenant to object to it provided they can establish a right to do so by custom are *obiter dicta*. This remark would apply with greater force to the observation of the learned Chief Judge that it did not follow that because "the power of alienating ancestral property was restricted, the power of alienating a tenancy would be equally so." The true point decided is stated in a few words in the judgment of Mr. Justice Frizelle to be that a tenant has an absolute right of alienation unrestrained by any one, if he complies with the provisions of Sections 53 and 56 of the Tenancy Act. So far the Act must be held to be a bar to any claim on the part of the tenant's agnates to contest a transfer of his right.

The only case in which the right of objection is unaffected by the Act is that mentioned by the two learned Judges first quoted, *viz.*, where the tenant has not complied with the provisions of the Act but the landlord nevertheless has completely stood aside. The questions before us can only arise in a case of this kind.

Having regard to the wording of Sub-section (2) of Section 59, I do not think it can be held to indicate even indirectly that the right of challenging improper alienations of the tenant's right is put on the same footing as if it was proprietary right in land. It means to lay down a rule of succession among descendants and collaterals claiming under the previous subsection, and the expression "as if it were land" appears to me to have been used for the sake of brevity alone.

But though the Act does not in my opinion throw any light on the question before us, it appears to me at the same time not to preclude any resort to general principles for the decision of that question.

In regard to alienation of proprietary right in ancestral agricultural land we generally find that the male owner in possession is subject to restriction. The persons who possess the power of restriction are his agnates in order of propinquity to him, the foundation of this right being to quote the words of Sir Meredyth Plowden in No. 107, *Punjab Record*, 1887, "that in respect of ancestral immoveable property in the hands of any individual, there exists some sort of residuary interest in all the descendants of the first owner or body of owners The owner in possession is not regarded as having the whole or sole interest in the property and power to dispose of it so as to defeat the expectations of those who are deemed to have a residuary interest, and who would take the property if the owner died without disposing of it."

This law had its origin in settlements of tribes or conglomerations of them over large tracts of land and in villages which were held by the settlers or their descendants for generations, but it is of wider application and applies equally to holdings occupied or acquired by individual proprietors. For instance suppose a Punjab agriculturist belonging to a tribe or resident in a locality in which the custom prevails purchases a plot of land today there can be no doubt that it will be ancestral property in the hands of his grandsons, and lineal as well as collateral male agnates of the actual holders would have the right of controlling alienations by them.

In short as respects ancestral land to which the custom applies the right of restricting alienations is possessed only by those male agnates who are the apparent, presumptive or potential heirs of the holder.

The term ownership, strictly speaking, signifies unlimited right of possession, enjoyment and disposition. It is obvious that such ownership and the custom above spoken of are mutually inconsistent. In respect of land therefore governed by the custom proprietary right is understood in a more limited sense, but even this meaning is by no means uniform. In some tribes the right of the male owner to alienate without necessity is absolutely restricted. In others he can give away a small part for religious uses or make some distinction among his heirs. In certain tribes again he can select one of his heirs and give his whole property to him, while in a few the sons have the right of controlling dispositions even of acquired agricultural land by the father. Yet all these persons are classed under the category of owners.

Occupancy right is a permanent interest in agricultural land the character of which varies greatly in different localities and under the provisions of the law. In some districts, *e.g.*, where the rainfall is scanty and the facilities for cultivation few, the right is scarcely distinguishable from proprietary right. In some places (see records of the earlier Settlements of South Punjab Districts) they pay no rent to the proprietor, pay their revenue direct to Government, and have a right to share in the *shamilat* when partition takes place; in others their status, save in the permanent character of their interest in their holdings, is not much superior to that of tenants-at-will. The origin of the right also is in many cases similar to that of proprietary right in land. I apprehend the typical cases are those in which the cultivators settled with the founders of a village or broke up waste land at their invitation subsequently to the foundation in order to help them to meet the revenue demand or in which proprietors lost their ownership involuntarily to others without losing their occupation.

Considering the varying connotation of the term ownership itself in this Province and the essential similarities between proprietary right and occupancy right, I do not see any reason to exclude analogies drawn from incidents relating to the former in inquiries about cognate questions regarding the latter. I am on the contrary disposed to think that the analogies are very valuable and ought to serve as guides to decision in the absence of positive evidence bearing on those questions. As in the case

of ownership of land, the right to contest alienations by the owner in possession is based on the right of succession, a similar principle ought naturally to govern the right to object to transfers of occupancy rights subject of course to the paramount right of the proprietor. As with reference to ownership in land the customary rights of reversioners are founded on the consensus of opinion of the community, a similar opinion may not unreasonably be supposed to exist in regard to the allied right of hereditary cultivation. Take for example the typical cases of occupancy right. Where the cultivators have settled with the founders of the village is it probable that while public opinion was unfavourable to any improper interference by alienation with the rights of agnates to succession to rights of ownership it would not be equally so to a similar interference in the case of occupancy rights in land? Or take the other instance of involuntarily parting with proprietary right. Custom would apply to prevent improper alienation as long as the right of ownership remained vested in the holder. Would it cease to apply as soon as the holder's interest became something less than ownership, though his possession remained? I think the natural presumption would be to the contrary.

I agree with Mr. Justice Walker that if the analogies drawn from the custom regarding alienations of proprietary right are excluded from consideration it would be practically impossible in most cases to get evidence of custom restricting the power of alienation in respect of occupancy rights alone.

Occupancy right in land was recognised by the customary law of this Province before the statute law on the subject was enacted. In so far as the provisions of the Punjab Tenancy Act apply the incidents of the right must be governed by them. But I do not think it follows that the power of controlling improper alienations previously possessed by the agnates of the tenant has necessarily been taken away because it is not mentioned in the Act.

I would accordingly answer the first question referred to us in the negative. In respect of the second I would apply that Section 59 (2) has no special bearing on it, but that on general principles evidence of custom regarding the power of alienation of proprietary right in agricultural land is relevant in an inquiry regarding the power of alienation of occupancy right where the rights of the landlord are not in question.

GORDON WALKER, J.— I think, it must be taken to have been the primary, if not the sole object of the framers of the Punjab Tenancy Act to define the relations between landlord and tenant.

18th March 1899.

No doubt there are provisions which might seem to go beyond this; but of these it may be said generally that they affect the interests of the landlord to the extent of defining the conditions under which the land reverts to him, or the limitations of the rights of others in his favour. Thus under Section 59 the succession of a widow of a tenant to a life interest is provided for, but at the same time her power of alienation is expressly restricted in the interests of the landlord (59 (3)). Section 59 (2) appears to be an exception to this general proposition, dealing so far as I can see only with the right of tenants *inter se*.

At all events it seems clear to me that in deciding a question of the nature arising here we have, unless Section 59 (2) may be taken as affording assistance, to look for guidance outside the four corners of the Tenancy Act. The landlord is in no way concerned, and the question is really one as to the custom applicable in respect of an interest in land. Interests in land, other than that of the mere tenant-at-will, vary, under the system of tenures existing in the Punjab, from the status of the full proprietor through those of the sub-proprietors and of the various grades of occupancy tenants to the lowest form of occupancy tenurc. Occupancy tenants have permanent interests in agricultural land which are capable of being inherited and otherwise transferred in accordance with ordinary law or custom save where the Act interferes for the protection of the landlord's rights. I think it is only *qua* the landlord that the rights of occupancy tenants can, as a matter of distinction from other permanent rights in land, be said to be created by statute.

My view then is that when questions of inheritance and the like arise in respect of the rights of occupancy tenants *inter se*, such questions are not distinguishable *in kind* from those that arise in respect of proprietary rights to which ordinary agricultural custom would be applicable.

It appears to me to be only reasonable that, where a general agricultural custom is found to prevail in respect of land, such a custom would be applicable, unless the contrary could be shown, to the permanent interests in land which occupancy tenants hold.

For these and the other weighty reasons given by my learned colleague, Mr. Justice Chatterji, I agree in the conclusion stated in his judgment with a possible reservation in respect of Section 59 (2) which is, however, immaterial.

18th March 1899.

CLARK, C. J.— I agree with the answers given by Mr. Justice Chatterji to the question referred.

I hold that where a tenant has not complied with the provisions of Sections 53 and 56 by giving notice to the landlord of his intention to alienate, or obtaining his previous consent in writing, the alienee obtains no indefeasible title to the tenancy under the Act.

The alienation is then voidable either at the instance of the landlord by Section 60, or by a collateral under customary law, if the collateral is able to establish the custom.

In considering the custom the Court may take into consideration the custom applicable as regards alienations of proprietary right, and as pointed out by Mr. Justice Chatterji a very strong inference would arise from the existence of the custom in the one case that it existed also in the other.

When the Punjab Tenancy Act was passed in 1887 the law as regards alienations of proprietary right was very different from what it is now since the publication of *Punjab Record*, No. 107 of 1887 and other similar judgments. The right of alienation of proprietary right has been very considerably restricted, it is not improbable that if a Tenancy Act were now under consideration, provisions would be introduced to put the right of collaterals on a similar footing as regards alienations of occupancy right as they are with regard to proprietary right or rather that the sections which now make such an alienation indefeasible as noted above, would not stand exactly as they now stand.

Where the Act therefore does not make such alienations indefeasible, it is permissible to apply the general principles of customary law according to which alienations of proprietary right are restricted.

No. 90.

Before Mr. Justice Chatterji and Mr. Justice Robertson.

BADRI DAS,—(PLAINTIFF),—APPELLANT,

Versus

MUNICIPAL COMMITTEE, DELHI,—(DEFENDANT),—
RESPONDENT.

} APPELLATE SIDE.

Case No. 528 of 1898.

Punjab Municipal Act, 1891, Sections 91, 92, 94, 95—Refusal of Municipal Committee to sanction re-erection of a projection—Discretion of Committee—Jurisdiction of Civil Court—Compensation.

Sections 92 and 150 of the Punjab Municipal Act, 1891, provide for the disposal of certain matters by a Municipal Committee and the Commissioner, and a Civil Court has no jurisdiction to interfere with the dis-

charge of their powers and duties by either. But when it is alleged that action has been taken by the Committee *ultra vires* or in bad faith, or which is not covered by the authority of the Act, the Court has the power to enquire into the matter, and if it finds that the action complained of is not covered by the powers given to such Committee under the Punjab Municipal Act, 1891, or any other Act, the Court can grant relief which in certain cases would take the form of an injunction.

In a case where a Municipal Committee refused to permit plaintiff to re-erect a certain construction which he had pulled down and wished to rebuild, except in accordance with the Committee's bye-law, whereupon plaintiff sued in the Civil Court for a decree that the Committee had no right to interfere with his re-building, and that they should not so interfere.

Held, that whether or not plaintiff was entitled to rebuild the construction without the permission of the Committee (a point not before the Court), his right to do so was not indefeasible, but must come to an end as soon as the Committee chose to exercise their powers under Section 91 or Section 95 of the Act, a matter entirely within their discretion and in which they were not liable to be controlled by the Civil Court, or, if so liable at all, only when they exercised their discretion in a capricious, wanton and oppressive manner.

Further appeal from the order of S. Clifford, Esquire, Divisional Judge, Delhi Division, dated 12th November 1897.

Madan Gopal, for appellant.

Muhammad Shah Din and Muhammad Shafi, for respondents.

The facts of the case sufficiently appear from the judgments of the Court delivered by

11th Feby. 1899. ROBERTSON, J.—This case is one of no great consequence in itself, but it raises a point of considerable importance. It will therefore be well to have the facts clearly set out before we proceed to pass orders. The plaintiff is the owner of a house in Delhi within municipal limits. Defendants are the Municipal Committee of Delhi. On 17th December 1896 Badri Das, plaintiff, put in a petition to the Municipal Committee asking leave to open four new doors, also, in the Katra Mashru side of the house, to erect a verandah on a *chajja* or projection of stone, 2 feet wide, also to build another projection 3 feet wide with a verandah in the Kucha Bulaka Begam side in another direction, with permission to put in some doors opening inwards. The portion with which we are mainly concerned in this case is the stone projection and superincumbent verandah in Katra Mashru. A plan was ordered to be prepared. The ward member (Jugal Kishore) then reported that the existing projection and verandah which it was desired to break up and rebuild might be

allowed, but that in the lane there was not room as the projection there stood. The Committee on 25th January 1899 decided that the rest of the application might be sanctioned, but that the projection in question with its verandah (B in the map) could not be sanctioned beyond the scale allowed by the by-laws in excess of which it was, that is to say, that in regard to the projection in question the Committee refused plaintiff permission to rebuild the projection as it stood before. The plaintiff appealed to a full meeting of Committee for leave to rebuild the projection as it stood, but this was refused with President's sanction. The plaintiff then brought the present suit, alleging that there is an old projection and verandah in his house, that he asked permission to rebuild it as before, but was refused. Plaintiff states "that he also wishes to construct another projection, 18 feet above it, which he has a full right to do, the Committee has no power to interfere with any repairs, changes or modifications in the projection, therefore their order is *ultra vires*. Plaintiff seeks an injunction to restrain them from interfering with plaintiff's repairs or alterations (*tamir-o-maram-mat chajja*) and verandah to his projection and superstructure."

The defendants pleaded that plaintiff had only the right to re-erect by permission of the Committee, which gave a clear order in accordance with the law. The mere fact that the projection was old did not give a right to rebuild. The Civil Courts have no jurisdiction, and plaintiff can claim no relief.

The first Court held that the plaintiff was merely rebuilding his old projection, which does not amount to a re-erection within the meaning of Section 94, which requires sanction, and gave a decree for that part of the claim, dismissing it as regards the new projection. The plaintiff's claim as regards the new projection is obviously incorrect, and need not be further discussed. Clearly the Committee had the power to refuse permission in that case. The Divisional Judge, however, found that the whole building had been practically rebuilt, except possibly the wall on which the *chajja* (projection) in dispute stands. Such a rebuilding was a re-erection within the meaning of the Municipal Act, and it was clear that plaintiff never obtained sanction for this; the Committee in sanctioning or refusing to sanction such a re-erection could have interfered with the *chajja*. Consequently their order doing so was within their powers, and plaintiff has no claim to relief. The matter has been made the subject of long and learned arguments on various points. But it appears to us that after all there is not such great difficulty in the case as at first sight appeared.

As regards the contention of the counsel for the respondent urged at the outset, that we have no jurisdiction to hear the case, we may dispose of it at once. Section 92 and Section 150 provide for the disposal of certain matters by the Committee and the Commissioner. We have no power whatever to interfere with the discharge of their powers and duties by either. But when it is alleged that action has been taken by the Committee *ultra vires* or in bad faith, or which is not covered by the authority of the Act, the Court has clearly the power to enquire into the matter, and if it finds that the acts complained of by the Municipal Committee are not acts which are covered by the powers given them under this or any other Act, the Courts can grant relief which in certain cases would take the form of injunction. The mere statement that a certain act is done under a certain clause or section of an Act by the party doing it, cannot be held to be conclusive proof that the act was so done, and falls properly within the scope of the authority quoted. That is a point for the Court to decide in each case which comes before it.

To come to the facts of the case. The application in itself was clearly one simply to renew an old standing projection and superstructure. The other parts of the application do not in this case really affect this point. The house may or may not have been rebuilt, the evidence on the file is not clear on this, but certainly there is no application to this effect, nor was it pleaded, and even the Divisional Judge notes that the wall bearing this projection is intact.

Now, what were the powers of the Committee as to this projection? They could clearly have ordered its demolition under Section 95 on payment of compensation. But the Committee plead that when the owner once proposed to take down the projections and rebuild it, they were then entitled to refuse permission. But it appears to us that Section 91, which seems to have been altogether overlooked, so far clearly lays down the principles to be followed in such a case. That section provides that "should any building or part of a building, project beyond the regular line of a street or beyond the front of the building, or either side thereof, the Committee may, whenever such *building or part* has been either entirely or in greater part taken down by notice require such building or part when being rebuilt, to be set back to, or towards the said regular line.

Provided that the Committee shall make full compensation to the owner for any damage he may sustain in consequence of his building or any part being set back.

Exactly the same principle applies in the present case. There is a projection on the plaintiff's house. The Committee have the power, under Section 95, to order him to remove it. They do not do so, but when he wishes to rebuild they refuse permission. They were clearly entitled to do so, both under Section 91, which, though it covers much more, would also cover such a projection, and under Section 95. But if he suffers any loss through their order he may be entitled to compensation, but whether he would be so or not is not for us to decide in this case.

We have clearly no power to restrain the Committee in this matter. It does not matter that the Committee did not in the first instance take action of their own motion. They have taken action, they have ordered plaintiff in rebuilding to set back a part of his building which projects beyond the front or side of the building, and they were within their rights in doing so. If the owner suffers damage he has his remedy which is not that sought by him in this case. We have only to decide on the facts before us.

We do not know what may or may not have been done to the building, whether or not anything has been done to bring plaintiff within the purview of Sections 92 and 94. As the case upon which the claim was brought stands the Committee were within their powers in refusing to allow plaintiff to rebuild his *chajja* or projection. If he was entitled to compensation in consequence he can claim it, but he cannot get relief by way of injunction.

It may be urged the Court might issue an injunction to the Committee restraining it from action until compensation has been paid or fixed. To this contention we cannot agree. The payment of compensation in such matters is not a condition precedent. When orders are given under these sections, within the terms of their authority, they must be obeyed; under certain circumstances resulting damage must be compensated for. As far as this case is before us it has not reached this stage.

The Committee have said: "If the projection is taken down it must be rebuilt only under certain restrictions." It would then lie on plaintiff to show if he did take it down and rebuild it that he had a just claim to compensation—a contingency which might never arise as he might elect to have it as it stands.

We are of opinion therefore that the relief sought in this case cannot be granted and we dismiss the appeal accordingly with costs.

13th Feby. 1899.

CHATTERJI, J.—I concur. Assuming, for argument's sake, that the plaintiff has the right to repair or re-construct the *chajja* and verandah (b) without reference to the Municipal Committee, all the Committee have done is to refuse his application for its reconstruction except in accordance with their bye-law.

They have issued no notice as far as we know from the present record calling upon him to demolish the *chajja* or verandah or to put them back. Under the circumstances the plaintiff has not made out any right to an injunction of the sort he has claimed. The plaintiff asked their sanction to rebuild, which they have refused. Plaintiff cannot ask for an injunction unless the Committee are bound to give leave as soon as it is applied for. This plaintiff has failed to prove even if we concede that he has the right of reconstruction without their sanction. The giving of sanction is a matter within the discretion of the Committee, and plaintiff cannot in any case compel them to grant it. The utmost he can do is to rebuild without the sanction on his own responsibility, but this does not involve the further consequence aforesaid.

The plaintiff does not ask for a mandatory injunction directing the Committee to give sanction, and such an injunction would, I think, be beyond the power of any Civil Court in this Province to grant. (Section 45, Specific Relief Act.) He claims a decree that the Committee have no right to interfere with his rebuilding, and that they shall not so interfere, but he has hardly disclosed a sufficient cause of action for getting such relief.

But waiving this objection plaintiff has made out no title to the declaration and injunction he seeks. Supposing he can rebuild the *chajja* and verandah without leave, a point not before us, he has no indefeasible right to do so. His right must come to an end as soon as the Committee choose to exercise their powers under Section 91 or 95 of the Act—a matter entirely within their discretion, and in which they are not liable to be controlled by the Civil Court, No. 24, *Punjab Record*, 1890, Civil, or, if so liable at all, only where they exercise their discretion in a capricious, wanton and oppressive manner, *Nagar Valab Narsi v. The Municipality of Dhandhuka*, I. L. R., XII Bom., 490. Such a declaration and injunction would therefore involve an interference with the statutory powers of the Committee and clearly cannot be granted. Moreover, at all events in view of all the above facts it would hardly be right to use the Court's discretionary power to grant an injunction in a case like the present.

No. 91.

Before Mr. Justice Chatterji and Mr. Justice Robertson.

ASA SINGH AND OTHERS,—(DEFENDANTS),—

APPELLANTS,

Versus

INDAR SINGH AND OTHERS,—(PLAINTIFFS),—

RESPONDENTS.

} APPELLATE SIDE.

Case No. 386 of 1896.

Civil Procedure Code, 1882, Sections 19, 43, 45—Suit for possession of immoveable property situate in different districts—Joint suit by reversioners against person in wrongful possession—Misjoinder of causes of action—“Cause of action,” meaning of.

Held, that under Section 19 of the Civil Procedure Code, when immoveable properties are situate in several districts, a suit in respect of the whole of the properties can be brought in any one of these districts. *I. L. R., XIV Calc., 661, followed.*

Where on the death of the survivor of two widows, all the reversioners, fourteen in number, brought a joint suit for possession of property which was alleged to be wrongfully withheld from them by the defendant, and which was admittedly undivided,

Held, that though the rights of the plaintiffs might be divisible and have accrued to them undivided on the death of the said widow, the substance to which those rights attached being undivided, plaintiffs' title and property was still joint, and that they were therefore entitled to jointly sue defendant whose wrongful holding of possession of the property was the single act which infringed those rights.

Held, further, that even if the words “cause of action” were construed in the limited sense of including merely the facts constituting the infringement of the right, but not those constituting the right itself, the plaintiffs were nevertheless entitled to sue jointly, as it was the same wrongful act of the defendant which infringed these rights, whether joint or distinct, in the property in dispute.

It appeared that during the life-time of the widows the reversioners had brought several suits for declaratory decrees in respect of various alienations effected by the said widows in favour of the present defendant from time to time, but that they had not sued for certain houses which were now included in their claim.

Held, that inasmuch as the reversioners' right to possession of the houses could not accrue during the life-time of the widows, their suit for possession thereof, on the death of the survivor of the widows, was not barred under Section 43 of the Civil Procedure Code.

First appeal from the order of Rai Bahadur Buta Mal, District Judge, Lahore, dated 23rd December 1895.

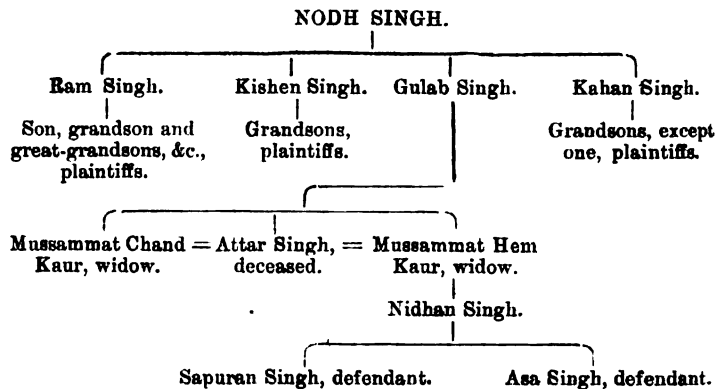
K. P. Roy and Lal Chand, for appellants.

Madan Gopal and Jaishi Ram, for respondents.

The facts of the case fully appear from the judgment of the Court delivered by—

29th Jan'y. 1899.

CHATTERJI, J —One Attar Singh, Jat, died before the summary settlement of the Lahore District, leaving certain property in that district, *Mauza* Ghawind, and in Dadpur Garoha in the Hoshiarpur District, where he appears to have mainly resided. He was childless at the time of his death, but left two widows, Mussammats Chand Kaur and Hem Kaur. The relationship of the present parties to Attar Singh is shown by the short pedigree table given below.



About two-and-a-half years after Attar Singh's death Mussammat Hem Kaur gave birth to a son, Nidhan Singh, who was accordingly regarded as illegitimate. The widows, however, and the mother of Attar Singh, Mussammat Rup Kaur, who was alive at his death, practically treated him like a son of Attar Singh. Mussammat Hem Kaur's share was entered in his name, while Mussammats Chand Kaur and Rup Kaur each got a third share of Attar Singh's land in the Hoshiarpur District recorded in their names. The earliest record in Ghawind was in 1856, and there Nidhan Singh, then a minor, and Mussammat Chand Kaur were entered as owning equal shares, and Azmat, Rajput, as their *sarbarah*. Nidhan Singh died before the widows of Attar Singh, aged about thirty-two, and his sons Sapuran Singh and Asa Singh were recorded in his place.

The illegitimacy of Nidhan Singh led to much litigation between him and the plaintiffs, or some of them. The following are the most material :—

In the Lahore District—

- (1). He sued Jowahir Singh, father of plaintiffs Nos. 1 and 2, and one Bhag Singh in 1855 for possession

of a house. His legitimacy was denied, and put in issue, and found against him, but a decree was passed in favour of Mussammat Rup Kaur, who was also impleaded as a plaintiff. Nidhan Singh's claim was dismissed.

- (2). While the revised regular settlement was in progress, some of the plaintiffs, Jowahir Singh and others, sued Mussammat Rup Kaur and Nidhan Singh for a declaration of right, or possession of five shares out of twelve, in Dheri Singha, in Ghawinda, four of which Mussammat Rup Kaur had purchased from one Dial Singh, and the fifth belonged to her son, Attar Singh, the plaintiffs contending that Nidhan Singh was illegitimate and no heir, and that Mussammat Rup Kaur was incompetent to make a gift of the five shares to him as she professed to do. It was found, in accordance with the previous decision, that Nidhan Singh was illegitimate, and that Mussammat Rup Kaur could not give him Attar Singh's original share, but could gift the four purchased shares to him. A decree was passed to this effect, and the entry of Nidhan Singh's name as to the one share was ordered to be expunged and Mussammat Rup Kaur's name substituted again, and the claim as to the four shares was dismissed. The entries, however, appear to have continued as before, and Nidhan Singh was shown owner of $2\frac{1}{2}$, and Mussammat Chand Kaur of $2\frac{1}{2}$ shares.

- (3). In 1883 Mussammat Chand Kaur made a gift of her half to Nidhan Singh's sons, the present defendants, and in 1887 plaintiffs sued to have it set aside, and got a decree in the Court of the District Judge of Lahore on 26th January 1888.

In the Hoshiarpur District there were several suits, of which the following alone need be mentioned :—

- (1). On Mussammat Rup Kaur's death Nihal Singh and others, plaintiffs, sued for a declaratory decree that they were the reversioners, and that the entry of one-half of Mussammat Rup Kaur's land in the name of Nidhan Singh should be expunged and Mussammat Hem Kaur's name

substituted. Plaintiffs got a decree, which was upheld by Colonel Gordon Young, Commissioner, Jullundur Division, and by which their reversionary right was declared on 22nd May 1876.

- (2). In 1877 some of the plaintiffs sued to expunge the name of Nidhan Singh from the original entry in respect of one-third of the land. This was decreed by the First Court, but on appeal their suit was dismissed by Mr. Brandreth, Commissioner, on 14th April 1878, on the ground that Nidhan Singh had been in adverse possession for more than twelve years.
- (3). In 1883 Mussammat Chand Kaur gifted the share of the Hoshiarpur property entered in her name, viz., 21 *bighas* 13 *biswas* in favour of the present defendants, sons of Nidhan Singh, and it was held that Nidhan Singh was illegitimate, and that the gift was illegal. It was accordingly set aside.

In the suit finally decided in favour of Nidhan Singh by Mr. Brandreth, only the descendants of Ram Singh and Kishen Singh, brothers of Gulab Singh, were concerned. The heirs of Kahan Singh were no parties, and are not bound by the result of that litigation.

On 19th January 1886 the descendants of Ram Singh sold their remaining interests in the Hoshiarpur property, viz., one-third of two-thirds, the remaining third having been adjudged to be Nidhan Singh's property as against them, or 7 *ghumaos* 2 *kanals* 2 *marlas* to the defendants by a registered deed for Rs. 900. Similarly on 17th December 1894 the heirs of Kishen Singh transferred their rights to the defendants for Rs. 900. The result of these transactions, with the decree of Mr. Brandreth, was that the descendants of Ram Singh and Kishen Singh lost all their interest in the Hoshiarpur property, and defendants became owners of four-ninths by purchase and one-third by Mr. Brandreth's decree. The heirs of Kahan Singh remained owners of two-ninths held by the widows, and had a claim which they have not yet attempted to enforce against the third share adjudged to Nidhan Singh by Mr. Brandreth.

Both the sales were of rights of expectancy, as Mussammat Hem Kaur and Chand Kaur were both alive when the first sale took place, and Mussammat Hem Kaur when the second was effected.

Mussammat Hem Kaur having died, the plaintiffs, heirs of all the three brothers of Gulab Singh, have brought this suit for possession of—

- (1) the whole of the Lahore property ;
- (2) two-ninths share of the Hoshiarpur property.

The last belongs exclusively to the descendants of Kahan Singh. In their amended plaint, dated 13th December 1894, the plaintiffs point out that the third share of Hoshiarpur property by which they mean that decreed to Nidhan Singh is not in dispute in this suit.

The pleas are voluminous, and are set out in the judgment of the lower Court as well as in the printed record, pages 3 and 4, and need not be recapitulated here. The issues are also numerous, and appear in pages 7 and 8 of the printed record.

The District Judge of Lahore, who tried the case as the Court of first instance, found in favour of the plaintiffs on all the issues framed, and decreed the claim. The defendants appeal on substantially the same grounds as were raised before him.

The ninth ground of appeal may at once be disposed of. It appears to be based on a misapprehension. As shown above, the third share originally entered in Nidhan Singh's name is not now claimed, and the heirs of Kahan Singh only claim one-third of the residue after deducting the shares sold by the plaintiffs of the other two branches. After going through the papers with us appellants' counsel admitted his mistake. The decree of the lower Court is only for a two-ninth share of the Hoshiarpur property, and is perfectly correct.

The other points which call for decision in this appeal are :—

1. Whether the lower Court had jurisdiction to hear the suit.
2. Whether the claim was bad on the ground of misjoinder of causes of action.
3. Whether the claim is barred by limitation.
4. Whether the claim for house property is barred by Section 43, Civil Procedure Code.
5. Whether the defendants are entitled to any, and, if so, what compensation for improvements of the property in suit.

These were argued at great length, though they do not appear to present any difficulties on the facts of this case.

As regards the first point counsel quoted many authorities which he admitted were not directly in point, but merely contained expressions of opinion in favour of his contention. He also admitted that there are other cases containing opinions to the contrary which are entitled to equal weight. In *Maseyk v. Steel & Co., I. L. R., XIV Calc., 661*, it is conceded in the judgment that under Section 19 of the Code of Civil Procedure where immoveable properties are situate in several districts a suit in respect of the whole of the properties can be brought in any one of the districts, and this appears also to be conceded in *Gopi Mohan Roy v. Doybaki Munden Sen, I. L. R., XIX Calc., 13*, though both cases properly relate to execution after decree. The contrary expression of opinion in *Shurup Ohundar v. Aminunnissa, I. L. R., VIII Calc., 703*, which was also an execution case, does not seem to be entitled to much weight. All these rulings relate to Section 223, Civil Procedure Code, and its scope. *Khatija v. Ismail, I. L. R., XII Mad., 380*, and No. 10. *Punjab Record*, 1891, support the view that the District Judge below had jurisdiction to hear the suit in respect of property situate in the Hoshiarpur District. In our opinion the last clause of Section 19, Civil Procedure Code, seems to make this perfectly clear, and it was only by insisting that the word "property" is used strictly in the singular that counsel was able to make a show of argument that it did not justify the lower Court's procedure. The word "property" has been used in a comprehensive sense, and is clearly intended to include cases in which several items of property are involved. In the Calcutta case reported in *I. L. R., Vol. XIV*, the Chief Justice uses the plural "properties" in dealing with the section, and there can be no doubt that he is right. The practice of the Court accords with the plain grammatical meaning of the term, and we have therefore no hesitation in holding that the lower Court had jurisdiction to entertain the suit.

Somewhat similar remarks may be applied in respect of the second contention. It was admitted that the constant and daily practice of the Courts was against it, and when questions of this kind arise, unless the words of the law are quite clear, the practice has to be shown to be wrong. A great number of authorities were quoted by counsel, but the utmost that could be said of their applicability was that by analogy they supported the conclusion that the suit was bad for misjoinder of causes of action. There are fourteen plaintiffs, and it is argued that there should have been fourteen suits against the defendants, i.e., one suit by each plaintiff for

his share of the property. The existing practice is certainly convenient, and we have little hesitation in holding that it is not proved to be wrong. The expression "cause of action" has not been defined in the Code, but we have no doubt that the meaning given to it in *Cooke v. Gill*, L. E., 8 C. P., 107, and *Read v. Brown*, L. E., 22 Q. B. D., 128, viz., that it includes every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court, is the one the Legislature has had in view in framing most if not all the sections of the Code relating to it. See *Murti v. Bhola Ram*, &c., I. L. R., XVI All., 165, F. B., *Salima Bibi v. Sheikh Muhammad*, I. L. R., XVIII All., 131, and *Raijo Kaur and another v. Debi Dial and others*, *ibid.*, 432. This necessarily involves the inclusion of the entire set of facts which constitute the plaintiffs' right and its infringement. The defendants have refused to recognise the plaintiffs' rights, and withheld from them the property to which they are entitled. The rights of the plaintiffs may be divisible, and may have accrued to them individually on the death of the widows, but the substance to which those rights attach is undivided. Both their title and their property therefore is still joint, and defendants holding possession of the latter is the single act which infringes their rights, and drives them to seek relief in Court. Counsel for the appellants admits that if several owners of joint property are dispossessed by the single act of a trespasser they may bring a joint suit for the recovery of the property. The defendants' possession in this instance is *ex hypothesi* that of trespassers, and the property being undivided we are unable to see why a joint suit should not lie.

In practice suits by Hindu or Muhammadan heirs are generally brought jointly, and the balance of convenience is greatly in favour of this course. Such an objection is seldom, if ever, raised, and hence there are not many authorities in which the point has been directly ruled. Yet authority is not wanting, though it is hardly required. See *Ram Sewak Singh v. Nakched Singh*, I. L. R., IV All., 261; *Salima Bibi v. Sheikh Muhammad*, I. L. R., XVIII All., 131, at page 139.

Even if "cause of action" is taken in a limited sense so as to include only the facts constituting the infringement of the right, but not necessarily those constituting the right itself, as was held with reference to Section 26 of the Code in *Harmoni Dassi, &c., v. Hari Charn Choudhry*, I. L. R., XXII Cal., 833, the plaintiffs are clearly entitled to bring a joint suit as the same wrongful act of the defendants infringes their rights in

the property in dispute whether those rights are joint or distinct. This case is another authority in support of the procedure which plaintiffs have adopted.

In our opinion therefore the second contention is wholly untenable.

The fourth point dealing as it does with the cause of action of the plaintiffs may also be conveniently decided before the other questions are taken up. The objection under Section 43, Civil Procedure Code, related to house property inasmuch as it was not sued for when the previous litigation against Nidhan Singh took place. It is clear, however, that the previous suits were for declaratory decrees, and it was clearly ruled in the Lahore case in 1869 that plaintiffs were not entitled to possession. Their right to possession in fact could not have accrued in the life-time of the widows who were entitled to hold for life. Taking the definition of "cause of action" in *Cooke v. Gill*, it is obvious that the plaintiffs' cause of action in this suit is quite different, and the same result would follow if the expression is taken in the limited sense it is held to be used in Section 26, Civil Procedure Code. The Full Bench case quoted from the 4th volume of the Allahabad series is also in favour of this view, which can be supported by numerous authorities if required. This point must also be decided against the appellants.

As regards the plea of limitation numerous decisions have been quoted to show that a trespasser holding adversely to the widow in possession for more than twelve years bars also the rights of the reversioners, and it is contended that Nidhan Singh held adversely to the widows, particularly after the failure of the plaintiffs to carry out execution of the decree granted in their favour by the Lahore Court in 1869. We have no hesitation in holding that none of these cases apply. It is absolutely clear on the facts that the widows, including Mussammatt Rup Kaur, strongly favoured Nidhan Singh, and wished to give him the status of a legitimate son of Attar Singh. He was born after Attar Singh. How did he get entry in respect of Mussammatt Hem Kaur's share unless with her consent. Mussammatt Rup Kaur's action in 1856 and 1868 shows that she did her best to put Nidhan Singh in possession, and so do the gifts in favour of the defendants by Mussammatt Chand Kaur. The case is if possible stronger in favour of the reversioners than No. 74, *Punjab Record*, 1895. It was repeatedly held by the Courts, both at Hoshiarpur and Lahore, that Nidhan Singh or his sons had not, nor could have adverse possession against the

widows, and this view is correct even if it is not conclusive against the defendants. The solitary finding of Mr. Brandreth in respect of the third share of the Hoshiarpur property, which is not in dispute in this suit, has no bearing on the case. We find therefore that the claim is not barred by time.

As regards compensation there is no proof worth the name that any substantial improvements were really made by Nidhan Singh or the defendants from his or their private funds. He is not shown to have possessed any sufficient funds of his own which would have been applied for this purpose, while throughout life he lived on friendly terms with the widows who were the owners of the property for life, and had pensions of considerable amounts from Government. The defendants have made out no claim for compensation on the score of improvements, nor can they be held to have acted *bona fide* under the circumstances if they have made any. The finding of the lower Court must be upheld on this point also.

The appeal is dismissed with costs.

Appeal dismissed.

No. 92.

Before Mr. Justice Reid and Mr. Justice Anderson.

MR. G. O'GORMAN,—(PLAINTIFF),—PETITIONER,

Versus

MAHTAB SINGH,—(DEFENDANT),—RESPONDENT.

} REVISION SIDE.

Case No. 746 of 1898.

Document, construction of—Promissory note or acknowledgment of liability—Suit based on document stamped with anna stamp—Admissibility of document in evidence—Right of plaintiff to fall back on original consideration—Evidence Act, 1872, Section 91—Stamp Act, 1879, Section 34.

Plaintiff in his plaint alleged that "on the 17th June 1897 defendant raised Rs. 500, cash, at Lahore and wrote the promissory note. He agreed "to repay the money by monthly instalments of Rs. 100, and further agreed "to pay Re. 1 per cent. per mensem as interest," that demand for payment had been made, and that the cause of action arose on the expiry of the period for the payment of each instalment, the suit being filed on the 14th October 1897 for three instalments and interest as above stated. The document referred to had affixed to it an anna stamp, and was in the following terms:—"Received from Mr. E. G., Superintendent, Punjab Dairy, the "sum of Rs. 500 only, as advance, repayable by instalments of one hundred "per month, and to bear interest at Rs. 12 per cent.—17th June 1897." It was signed by the defendant.

The first Court dismissed the suit on the ground that the document upon which it was based was a promissory note, payable otherwise than on demand, and, being insufficiently stamped as such, could not, under Section 34 of the Stamp Act, 1879, be admitted in evidence for any purpose,

even on payment of a penalty, in a civil suit. Plaintiff applied for revision of this order, and it was contended on his behalf that the document bore a dual character, as a promissory note and as an admission of liability, and was admissible in evidence as an acknowledgment. It was further contended that the Rs. 500 were made up of advances for milk made at various times, and that plaintiff was in any event entitled to fall back upon the original consideration of the contract.

Held, that the document upon which plaintiff based his suit was a promissory note, payable otherwise than on demand, and, being insufficiently stamped as such, could not, under Section 34 of the Stamp Act, be received in evidence or acted upon in a civil suit.

Held, further, that plaintiff was not entitled to aver against his plaint or to amend his plaint in such a manner as to sue on the original consideration.

Held, also, that from the frame of the suit it was clear that the document sued on embodied the contract between plaintiff and defendant, and was the contract out of which defendant's liability arose, and that under Section 91 of the Evidence Act, the document was the best evidence of the contract, and no other evidence of the terms thereof could be given.

Petition for revision of the order of Lala Narain Das, Judge, Small Cause Court, Lahore, dated 14th January 1898.

Herbert, for petitioner.

Ishwar Das, for respondent.

The judgment of the Court was delivered by

27th Feby. 1899.

REID, J.—The plaintiff filed a suit on the following document:—

“Received from Mr. E. Goodwin, Superintendent, Punjab Dairy, the sum of rupees five hundred (Rs. 500) only as advance, repayable by instalments of one hundred per month, and to bear interest at Rs. 12 per cent. 17th June 1897;” signed by the defendant, and bearing a one-anna adhesive stamp. The claim was for Rs. 315, three instalments and interest.

The Court below dismissed the suit, holding the document to be a promissory note, payable otherwise than on demand. As such the stamp was insufficient, and the document could not, under Section 34 of the Stamp Act (I of 1879), be admitted in evidence for any purpose, even on payment of a penalty, in a civil suit. For the plaintiff-petitioner it is contended that the document bears a dual character, as a promissory note and as an admission of liability, and that it is admissible in evidence as an acknowledgment.

Reliance is placed for either side on (1) *Kanhaya Lal v. Stowell*, I. L. R., III All., 581; (2) 42 *Punjab Record*, 1895; (3) *Balbhadrar Prasad v. Maharaja of Betia*, I. L. R., IX All., 351;

(4) *Hira Lal v. Data Din*, I. L. R., IV All., 135; (5) *Golab Chand Marwares v. Thakurani Mohokoom Kooares*, I. L. R., III Cal., 314; and (6) *Fateh Chand Har Chand v. Kisan*, I. L. R., XVIII Bom., 614.

In the first case quoted the suit was based on account books, and it was alleged that the defendant had given the following document to the plaintiff "Agra, 14th November 1877. Due to Kanhaya Lal, cloth merchant, the sum of Rs. 200 only, to be paid next January 1878," which was relied on as an acknowledgment. A majority of a Full Bench of the Allahabad Court held that the document though not admissible in evidence as a promissory note in proof of a promise to pay, by reason of being stamped only with a one-anna stamp, was, nevertheless, admissible as a memorandum in proof of an acknowledgment of a debt. The question referred to the Court was simply whether the document was admissible in evidence. The suit was not based on the instrument.

In the second case quoted the suit was based on a document which was held to be a promissory note, insufficiently stamped. It was further held that the document could not be admitted or acted upon, and that the plaintiff's case disclosed no cause of action upon which the suit could proceed after the document had been rejected and put out of consideration. The judgment proceeded "Where there is no previous transaction of loan, and "the promissory note is given in return for a loan of money or "in payment of moveables purchased, the sole question appears "to be, does the promissory note represent the terms of the "contract reduced to writing, or was there some other contract "which the plaintiff can fall back upon, alleging that the promissory note was given merely as a collateral security for "the payment of the debt? To apply the language "of Garth, C. J., in the leading case on the subject, *Sheikh Akbar v. Sheikh Khan*, I. L. R., VII Cal., 260, the deposit "was made upon the terms contained in the note, and no other. "In such a case the note is the only contract between the "parties, and if, for want of a proper stamp, the note is not "admissible in evidence the creditor must lose his money." In the third case quoted it was held that the unstamped note tendered in evidence did not embody the contract between the plaintiff and the defendant, and could not therefore be considered as the contract, out of which the defendant's liability arose, and it was consequently held that it was open to the plaintiff to prove the verbal contract, i.e. to prove what the consideration for the note was, in the same way as if he had

lent money or delivered goods to the defendant. In the fourth case quoted it was held that the existence of an insufficiently stamped promissory note for the balance of a sum due on a pledge of moveable property, the note having been executed as consideration for the return of the property by the creditor did not bar a suit for the balance. In the fifth case quoted it was held that the existence of an unstamped promissory note did not prevent the lender of money from recovering on the original consideration, if the pleadings were properly framed for that purpose, and that the great power given by the Code of Civil Procedure of raising the true issues between the parties prevented the question of pleading having much importance. A distinction was drawn between cases in which the plaintiff did and did not seek to give independent evidence of the consideration, and it was apparently conceded that where a plaintiff sued on an unstamped promissory note alone, without giving any independent evidence of consideration, he must fail.

In the sixth case quoted a suit was filed for money due for goods purchased from time to time by the defendant, for which he had struck a balance in his own writing: this balance was unstamped, and therefore incapable of being acted upon as an acknowledgment of a particular sum being due, but it was held that the suit differed from one brought on an insufficiently stamped *hundi*, and that the balance struck might be used for the collateral purpose of showing an acknowledgment of an existing liability in respect of goods sold. *Chenbasapa v. Lakshman Ram Ohandra*, I. L. R., XVIII Bom., 369, in which it was held that a *hundi* was acted upon where a decree was passed on it, whether its execution was admitted or proved, and that owing to the language of the Stamp Act a Court could not give effect to an insufficiently stamped *hundi* in either case, was distinguished.

In *Radhakant Shah v. Abhoy Churn Mittar*, I. L. R., VIII Calc., 721, Garth, C. J., referred to VII Calc., 260 (*supra*), saying—
 “Of course, if the consideration for the bill had been an independent cause of action, complete in itself before the bill was given, the appellant’s argument would have been well founded. But here it is stated in the plaint, and it is evidently the fact, that the Rs. 500 which was the consideration of the bill, was advanced by the plaintiffs to the defendants upon this particular bill, and as the bill itself is the best evidence of the terms upon which the advance was made, the plaintiffs could not establish their case without proving the bill.”

In *Valiappa v. Muhammad Khasim*, I. L. R., V Mad., 166, it was held, where the plaintiff brought a suit against the defendant, the drawer of a *hundi*, to recover a balance due thereon, that the suit was brought on the *hundi*, and not to recover the consideration, and that the plaintiff could recover only on the *hundi* which was insufficiently stamped and on production was obviously incapable of being acted on, the result being that the suit necessarily failed.

The first paragraph of the plaint in the present suit runs as follows:—"On the 17th June 1897 the defendant raised Rs. 500 cash at Lahore, and wrote the promissory note. He agreed to "repay the money by monthly instalments of Rs. 100, and "further agreed to pay Re. 1 per cent. per mensem as interest." The second paragraph alleged demand, and stated that the cause of action arose on the expiry of the period for the payment of each instalment, and the suit was filed, on the 14th October 1897, for three instalments and interest as above stated. At the hearing it was stated by the plaintiff-petitioner's pleader that the sum of Rs. 500 was made up of advances for milk made at various times. We do not think that he can be allowed to aver against his plaint, or to amend his plaint in such a manner as to sue on the original consideration.

The document sued on embodied the contract between the plaintiff and the defendant, and is the contract out of which the defendant's liability arose. This is clear from the frame of the suit, the claim being for the instalments due at the date of the suit, and not for the whole sum due at the date of the execution of the document.

Whatever may have been the original consideration, the contract for payment by monthly instalments was effected by the document which is the best evidence of the contract, and, under Section 9) of the Evidence Act, no other evidence of the terms of the contract can be given. Section 34 of the Stamp Act is a bar to the document, which is an insufficiently stamped promissory note, being received in evidence or acted upon, and the Court below rightly dismissed the suit based on it.

The application for revision is dismissed with costs.

Application dismissed.

No. 93.

Before Mr. Justice Gordon Walker and Mr. Justice Anderson.

SADHU,—(DEFENDANT),—APPELLANT,

Versus

MISRI,—(PLAINTIFF),—RESPONDENT.

APPELLATE SIDE. }

Case No. 1127 of 1896.

Custom—Succession—Abandonment of worldly affairs—Gossains.

A broad distinction is to be drawn as regards the powers of inheriting property between *fajirs* or members of a religious order who have, and those who have not, entirely renounced the world, the latter class not being disqualified from succession in their natural families.

In a case where it appeared that the plaintiff though he left his village and joined a religious order (*Gossains*), had not renounced the world but, on the contrary, was the father of three children who appeared to be grown up, *held*, that plaintiff had never reached the stage of complete asceticism which would disqualify him from inheritance, and that he was entitled to succeed to the estate of his nephew in preference to the defendant, who, if a relation at all, was a distant one.

Further appeal from the order of S. Oliford, Esquire, Divisional Judge, Delhi Division, dated 30th June 1896.

Rozdon, for appellant.

Madan Gopal, for respondent.

The judgment of the Court was delivered by

22nd Feb'y. 1899.

GORDON WALKER, J.—As regards the question of the identity of plaintiff with Misri, the uncle of Wazira, there seems to us to be no room for doubt, and we accept the concurrent finding of the lower Courts on this point. The evidence of this is complete.

Next as regards the question of custom it is pointed out to us that no question of abandonment by Misri, plaintiff, arises. He was joint owner with his nephew, Wazira; and even taking it that he lost his rights as a co-sharer with Wazira, the question now is whether he is entitled to succeed as heir of Wazira. It is clear that he is, unless he is incapable of inheritance or disqualified.

“By abandoning worldly affairs and entering a strictly religious or ascetic order a person becomes civilly dead, and forfeits his right of inheritance” (*Rattigan's Digest*, para. 30). This expression of the general custom in the matter is supported by many other authorities, and it is clear that a person who enters a religious order may stop short of asceticism and the entire abandonment of worldly affairs which would disqualify him from inheriting property. If he does so stop short, there

is apparently no loss of the right to succeed to property. On this point see Mayne's *Hindu Law and Usage* (4th Edition), paras. 546 and 559. In the latter it is noted that the "mere fact that a person calls himself a *Bairagi*, or religious mendicant, or indeed that he is such, does not of itself disentitle him to succeed to property." Reference may also be made to the decisions of this Court in *Punjab Record*, Nos. 1 of 1868, 15 of 1874, 24 of 1880, and 29 of 1881, which fully support this view. Other authorities on the subject are *I. W. R.*, 309, *X W. R.*, 172, *XV W. R.*, 197. Also see Census Reports, Ibbetson, p. 386, MacLagan, p. 112—3, 124—5, the last with special reference to what is meant by the term *Gossain*.

It is clear, therefore, that a broad distinction is to be drawn, as regards the power of inheriting property, between *faqirs* or members of a religious order who have, and those who have not, entirely renounced the world, and that the latter class are not disqualified from succession in their natural families. In the present inquiry ten instances have been quoted in which *Gossains* (the order to which plaintiff belonged) have succeeded to property in the usual way. The learned Divisional Judge appears to be in error in stating that only four such instances have been cited.

We think that the above is the correct view of the custom rather than that taken by the Divisional Judge, *viz.*, that "a *faqir* on marriage ceases to belong to the *dera* as unfit for the "brotherhood." No doubt there is evidence (see that of Sujjanpuri) to the effect that plaintiff was turned out of the order because he was not an ascetic. But the question rather is whether there was on the part of plaintiff any such complete renunciation of the world as would involve his becoming civilly dead. It seems clear to us that there was not; but that the plaintiff, though he left his village and joined a religious order, did not renounce the world. On the contrary, he is the father of three children who appear to be grown up. He never reached the stage of complete asceticism (sometimes apparently called *abdhut*) which would disqualify him from inheritance, and he is entitled to succeed to the estate of his nephew, Wazira, in preference to the defendant, Sadhu, who, if a relation at all, is a distant one.

As regards the debts owed by the deceased and his funeral expenses there has been a very full inquiry, and the findings of the lower Courts on these points should be accepted. They were fully gone into in the further inquiry ordered by the Divisional Judge.

The fifth ground of appeal is put forward under a misapprehension and is withdrawn.

We think that the appeal of the defendant, Sadhu, must fail, and it is dismissed with costs.

Appeal dismissed.

No. 94.

Before Mr. Justice Chatterji and Mr. Justice Robertson.

KARTAR SINGH AND ANOTHER,—(DEFENDANTS),—
APPELLANTS,

APPELLATE SIDE. }

Versus

MATHAR SINGH,—(PLAINTIFF),—RESPONDENT.

Case No. 298 of 1896.

Adoption of brother-in-law's son—Hindu Law or custom—Sikh Khatri of Rawalpindi—Burden of proof—"Agricultural tribe."

One K. S., a Sikh Khatri, of the Bindra section, having adopted G. S., his wife's brother's son, plaintiff sued for a declaration that the adoption was invalid by custom and would not affect his reversionary rights. It appeared that the families of plaintiff and K. S. had held land for at least two generations, and that the total ancestral land in the possession of K. S. was about 4 *ghumaos* 5 *kanals*. The lower Courts decreed plaintiff's claim on the ground that defendants had failed to prove that the said adoption was valid by custom.

Held, that though the primary rule of decision in a suit of the present character is custom, there is no necessary legal presumption that a particular custom bearing on the point in issue exists, Section 5 of the Punjab Laws Act, 1872, only casting on the Court the duty of enquiring whether there is any such custom binding on the parties, and, if there is, to decide the suit in accordance therewith.

Held, further, that under Hindu Law, which was the personal law of the parties, the adoption in question was perfectly valid.

Held, therefore, that plaintiff who was suing to set aside an adoption, which was valid by the personal law of the parties, on the ground that it was invalid by custom, must fail if the custom upon which he relied was not proved, and that he was accordingly bound by the rules of pleading to establish that custom affirmatively.

Held, further, that inasmuch as Khatri do not ordinarily form an agricultural but a trading community, the usages of agriculturists cannot be presumed to apply to them, and therefore that plaintiff could not claim the benefit of the presumption laid down by the Full Bench in No. 50, *Punjab Record*, 1893, so as to shift the burden of proof from himself to defendants.

Found, upon the evidence, that plaintiff had failed to prove that by custom among the parties the adoption of a wife's brother's son was invalid.

Further appeal from the order of J. G. M. Rennie, Esquire, Divisional Judge, Rawalpindi Division, dated 24th January 1896.

Ishar Das, for appellants.

Beechey, for respondent.

The judgment of the Court was delivered by

CHATTERJI, J.—The plaintiff and defendant, appellant 1, 10th Jany. 1899. Kartar Singh, are Sikh Khatri of the Bindra section of Sukhu in the Rawalpindi District. Plaintiff is Kartar Singh's brother and has sued for a declaration that the adoption of Gulab Singh, appellant 2, by Kartar Singh, is invalid by custom and would not affect his reversionary rights. Appellant 2 belongs to the Abhera section of Khatri and is the son of Kartar Singh's wife's brother. The plaint recites that the adoption was made by means of a deed registered on 6th January 1890, that mutation of names has taken place in Gulab Singh's name in respect of land belonging to Kartar Singh without however transfer of possession, and that the land as well as all immoveable property held by Kartar Singh is ancestral.

The defendants pleaded that the adoption took place long before the deed and that the claim was barred by time. They further urged that the adoption was valid and had been acquiesced in by the plaintiff.

Issues were drawn covering all the points in dispute on the pleadings.

The first Court held the claim to be within time, the adoption to be invalid by custom and decreed the claim. The Divisional Judge on appeal upheld these findings and the decree of the lower Court. The defendants appeal, again urging the contentions put forward in the Courts below.

Before taking up the merits of the appeal we may mention that appellants' counsel applied at the hearing to have a compromise, alleged to have been arrived at between his clients and the plaintiff's authorised agent recorded by us and the appeal disposed of in accordance therewith. After hearing the parties and their counsel we rejected this application as we were of opinion that the parties had not come to any definite agreement.

As regards the point of limitation we are not prepared after going through the evidence to differ from the finding of the lower Courts. That Gulab Singh lived with Kartar Singh long before 1890 and was married by him is well established and indeed is not disputed. It is also probable that he was to all intents and purposes treated as a son, but we are unable to

hold in the face of the concurrent opinions of the learned Judges below that a regular and complete adoption took place prior to the execution of the deed. The circumstantial evidence is conflicting and inconclusive. The entries in the Hindi School register, if perfectly reliable, which is doubtful, only show that Kartar Singh called Gulab Singh his son at the time, but this does not necessarily mean a completed adoption and is consistent with a contemplated one. There was relationship by marriage between the two and Gulab Singh whose mother was dead was no doubt very dear to Kartar Singh's wife and therefore treatment as a son is not conclusive. The performance of the marriage of Gulab Singh by Kartar Singh is explainable in the same way as well as the *tambol* given by plaintiff assuming it is proved. The deed of 21st September 1882, executed by Gulab Singh and Kartar Singh together appears to indicate that an actual adoption had not taken place at the date of that document, while the wording of the promise made by Kartar Singh in favour of the plaintiff in the deed of 14th January 1882 is somewhat dubious. The language probably more readily admits of the interpretation put on it by the defendants; still it is very curt and the word *mutbanna* may have been used to denote a person meant to be but not actually adopted. The oral evidence has been disbelieved by two Courts, and in the absence of some tangible fact which puts the adoption beyond doubt we are not disposed to take a different view. On the whole therefore we find that the adoption prior to 1890 is not satisfactorily proved, and that in any case plaintiff's knowledge of the fact is not made out. We therefore hold that the claim is not barred by time.

The next question is whether the adoption of Gulab Singh is invalid by custom. This is the form in which issue should be drawn and in our opinion the lower Courts were wrong in throwing the *onus* of proof of the validity of the adoption on the defendants. The primary rule of decision in a matter of this kind is undoubtedly custom, but, as pointed out in No. 149, *Punjab Record*, 1888, and No. 60, *Punjab Record*, 1895, there is no necessary legal presumption that a particular custom bearing on the point in issue exists. Section 5, clause (a) of the Punjab Laws Act, only casts on the Court the duty of enquiring whether there is any such custom binding on the parties and if there is to decide in accordance with it. The plaintiff who is suing to set aside the adoption and who would fail if the custom he relies on invalidating the adoption is not proved is by the rules of pleading bound to establish that custom. It is true that among certain tribes, mostly land-holding

agriculturists, definite customs regarding adoption have been ascertained by inquiry and declared to exist by previous judgments of this Court. In cases covered by these decisions or where a definite rule on the subject of *onus* has been laid down by a Full Bench, the plaintiff would be relieved of the burden of proof which in the first instance lay on him and which would then be shifted to the defendants. The plaintiff contends that people of his tribe are agriculturists and that the adoption of Gulab Singh being that of a non-agnate is to be presumed to be invalid according to the principle laid down in No. 50, *Punjab Record*, 1893. The Courts below have accepted this contention. The first Court also held that the adoption was had under Hindu Law. This however is a clear mistake and is due to a misconception of the prohibition against the adoption of a person whose mother could not have been married by the adopter. Mayne, Section 123, Bhattacharjia's *Hindu Law*, page 168. Under Hindu Law the adoption would be perfectly valid, and it is the plaintiff who is seeking to set up a custom opposed to his personal law who should prove such custom. Nor are we prepared to admit that the case is governed by No. 50, *Punjab Record*, 1893. The parties are not members of an agricultural tribe. They hold land and may have held it for more than one generation, but that does not bring them within the category of those to whom the ruling is applicable. Khatri do not ordinarily form an agricultural but a trading community, and the usages of agriculturists cannot be presumed to apply to them; see remarks on this subject in No. 122, *Punjab Record*, 1893. This is especially true of Khatri in the Rawalpindi District, where by far the great majority of agriculturists are Muhammadans and where the Khatri takes the place of the *bania* in South-Eastern Punjab in regard to trade and business transactions; Gazetteer, page 118. Major Cracroft's first Settlement Report, paragraphs 91 and 323½.

There is no evidence on the record showing the Khatri of Sukhu to be agriculturists in the sense the term is applied to Jats and Rajputs for example. All that is shown is that plaintiff and Kartar Singh hold land for at least two generations. The total ancestral land held by Kartar Singh appears to be about 4 *ghumaos* 5 *kanals* 7 *marlas*, and it is doubtful whether, having regard to this circumstance, the allegation of respondent's counsel that he has never had any other means of subsistence but the income of his land can be safely accepted. However this may be, there is nothing to show that the parties belong to the class of agriculturists to whom No. 50, *Punjab Record*, 1893, is applicable, and the presumption is to the contrary.

We hold, therefore, that plaintiff cannot take the benefit of that ruling, but is bound to show affirmatively a custom whereby the adoption of a wife's brother's son is invalid.

Judged from this starting point, plaintiff cannot be said to have proved his case. The Courts below decided in his favour because they erroneously threw the *onus* of proving the validity of the adoption on the defendants. Plaintiff's oral evidence is insufficient to prove the custom, while the witnesses for the defence at least prove this much, that adoptions of this kind are not uncommon among Khattris in that part of the country. The record of customs of the Rawalpindi District, (see) answer to Question 32 seems to indicate an extensive and unrestricted power of adoption, and this so far is against the plaintiff's contention that the parties are bound by the custom of agriculturists of Eastern Punjab. We think upon a consideration of the whole case that the adoption of Gulab Singh cannot be presumed to be invalid by custom on *à priori* grounds, and that it has not been proved to be so by positive evidence. The plaintiff's claim for a declaration that it is bad must accordingly fail.

Respondent's counsel, however, asks us to hold that the transfer of land by Kartar Singh to Gulab Singh being an alienation of ancestral property to a non-agnate is invalid even though the adoption be good. He refers to the answer to Question 34 in the Record of Customs under the head of adoption and the agreement between plaintiff and Kartar Singh in 1880. We are of opinion, however, that the suit is not for setting aside the alienation, though the fact was mentioned in the plaint. We cannot by any means treat the plaint as expressly or impliedly asking for this relief. The pleadings certainly do not show it, and there was no issue on the point. We cannot therefore go into this question without an amendment of the plaint and a fresh issue and a further inquiry. We do not think a sufficiently strong case has been made out for our granting such an exceptional indulgence to the plaintiff at this stage. The plaintiff will be able to claim the relief, if he wishes to do so, when his cause of action for possession of the land will arise on Kartar Singh's death.

We accept the appeal and dismiss the plaintiff's claim, but as the circumstances are rather exceptional we leave the parties to pay their own costs throughout.

Appeal allowed.

No. 95.

Before Mr. Justice Chatterji and Mr. Justice Robertson.

HARNAM SINGH,—(PLAINTIFF),—APPELLANT,

*Versus*MUSSAMMAT KISHNI AND ANOTHER,—(DEFENDANTS),
—RESPONDENTS.

} APPELLATE SIDE.

Case No. 1060 of 1898.

Custody of wife—Conduct of husband—Discretion of Court.

In suits for the custody of the person of a wife, the Court requires from the husband proof not merely that he is the husband of the woman, but also that he has done nothing to forfeit his right to such special relief by failure in his own duty towards his wife. He has to show not only that he is not estopped from exercising a claim or privilege, but that he has done his duty in the matter towards his wife so as to entitle him to claim this extreme exercise of authority on his behalf.

Where it appeared that plaintiff's wife, of whom custody was sought, had some time previously absconded with another man, against whom plaintiff instituted criminal proceedings under Section 498 of the Penal Code, which he subsequently compromised by divorcing his wife, and that the defendant, R. S., thereafter married the said woman by *karewa*, held, that inasmuch as plaintiff had done all he could to divest himself of connection with, and responsibility for, his wife, the Court was not justified in putting in force the discretionary power vested in it and giving plaintiff a decree for the custody of his wife.

Further appeal from the order of W. A. Harris, Esquire, Divisional Judge, Umballa Division, dated 14th July 1898.

Sangam Lal, for appellant.

Ram Chander, for respondents.

The judgment of the Court was delivered by

ROBERTSON, J.—The plaintiff in this case sued for the custody of his wife, Mussammat Kishni, whom he had married by *karewa*. Of this fact there appears to be no doubt. But it appears that Mussammat Kishni absconded with another man; plaintiff instituted criminal proceedings under Section 498 and then plaintiff compromised matters by divorcing his wife, who was thus taken away by defendant Ran Singh, who, as is found by both Courts, has married her by *karewa*. 2nd March 1899.

Before us it was urged that the object of the compromise was simply to save Ran Singh from punishment, but as in order to do this plaintiff had simply to drop the prosecution we cannot see the force of this argument. It is further urged that plaintiff in view of the personal law to which he is subject could not divorce his wife. Into this point also

it is not for us to go. We are asked to exercise a jurisdiction in plaintiff's favour the exercise of which is discretionary and which is always one of grave consideration, and we have simply to see whether, as the case stands, we are justified in taking the strong step of granting to plaintiff an order for the custody of his wife, in view of his conduct to her. The principles which are to guide us are those followed in No. 6 of 1885. In that case a husband had allowed his wife to go away with another man and for nine years had made no effort to reclaim her. It was held that either he had made up his mind to give her up and let her go or else grossly neglected making the exertions due from him to keep his wife safe in his protection, in either of which cases he was entitled to no assistance from the Court. In this case no long time has been allowed to elapse, but there has been a deliberate relinquishment of his claim, an attempt at divorce, whether good or bad in law, and an acceptance of his wife's connection with Ran Singh which in our opinion disentitles the plaintiff to any assistance at our hands. We do not think that Section 115, Evidence Act, is so important an element in the case perhaps as it appeared to the lower Courts. The ground we stand on is rather that in the exercise of a special jurisdiction of this kind involving the custody of the person of a wife we require from the husband not merely proof that he is the husband, but that he has done nothing to forfeit his right to the special relief by failure in his own duty towards his wife. He has to show not merely that he is not estopped from exercising a claim or privilege but that he, too, has done his duty in the matter towards his wife so as to entitle him to claim this extreme exercise of authority on his behalf. In this case we are quite clear that he has not fulfilled these conditions, that so far as it lay in his power he abandoned his wife to another man to whom she is now married by *karswa*, and that he has forfeited his right to the assistance of the Courts. In the criminal case brought by Harnam Singh, present plaintiff, against Natha Singh and Ran Singh and Gurdit Singh, Harnam Singh put in an application on 19th November 1897 in which he states clearly that he has divorced Mussammat Kishni (*talak*), and that Mussammat Kishni had given up her claim against him for maintenance and property; that Harnam Singh and Mussammat Kishni had now no connection at all with each other, and that as regards the defendants in that suit he wished to withdraw the charge (*ratinama deta hun*). Clearly therefore the plaintiff had done all he could to divest himself of connection with and responsibility for his wife, and under these circumstances we do not consider ourselves justified in

putting in force the discretionary power vested in us and giving him a decree for the custody of his wife.

We dismiss the appeal with costs accordingly.

Appeal dismissed.

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No. 96.

Before Mr. Justice Chatterji and Mr. Justice Robertson.

**MAN SINGH AND OTHERS,—(DEFENDANTS),—
APPELLANTS,**

Versus

DIP SINGH,—(PLAINTIFF),—RESPONDENT.

} APPELLATE SIDE.

Case No. 863 of 1896.

Pre-emption—Act IV of 1872, Section 12—"Landowner" and "Landholder"—Purchaser of small plot of unculturable land.

Plaintiff, one of the old proprietary body with a large holding, claimed possession by pre-emption of certain land which had been sold by one M. to defendants by registered deed of sale. Defendants admitted plaintiff's right to pre-empt, but pleaded that their rights of pre-emption were equal as they also owned land in the same *taraf* as the land in question. It appeared that defendants owned 1 *kanal* 1½ *marlas* of land *ghair mumkin chappar*, that is unculturable pond, which they purchased for Rs. 200. The point for decision was whether the possession of this plot of unculturable land constituted defendants-vendees "landowners or landholders" within the meaning of Section 12 (d) of Act IV of 1872.

Held, that defendants were not "landowners" or "landholders" within the meaning of the said section so as to be entitled to a right of pre-emption equal to that of plaintiff.

No. 153, *Punjab Record*, 1888, followed; No. 7, *Punjab Record*, 1896, distinguished.

Further appeal from the order of Sardar Gurdial Singh Man, Divisional Judge, Ferozepore Division, dated 17th July 1896.

Ishwar Das, for appellants.

Golak Nath, for respondent.

The judgments delivered by the learned Judges were as follows :—

ROBERTSON, J.—In this case one Dip Singh claimed possession, by pre-emption, of 47 *kanals* 15 *marlas* which had been sold by Misri, defendant-vendor, to defendants 2, 3, 4, defendants-vendees, by registered deed in which the sale money is entered at Rs. 900. The plaintiffs have admittedly a right to pre-empt, but defendant-vendee pleads that his right is equal as he also owns land in the same *taraf* (*i. e., taraf adna*) as the land in question. It appears that defendant-vendee owns 1 *kanal* 1½

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marlas of land *ghair mumkin chappar* that is unculturable pond, not assessed to land revenue, and it appears that defendant-vendee purchased this land for Rs. 200, which means nearly Rs 1,500 a *ghumao* = acre of perfectly useless land. The main question in this case is whether the possession of this 1 *kanal* 1½ *marlas* of unculturable land constitutes defendant-vendee a "landowner or landholder" under Section 12 (d) of Act IV of 1872. The *patwari* states that this possession gives defendant-vendee a right to culturable *shamilat* or common land, but it appears from the order of the arbitrators in partition proceedings in 1875 when the whole village common was partitioned, that everything which could be cultivated was then partitioned and nothing left but land which could not be broken up. The vendee purchased the 1 *kanal* 1½ *marlas* on 6th April 1893 and the land in dispute on 21st April 1894. It certainly appears that the purchase of 1 *kanal* 1½ *marlas* of perfectly useless land for a high price could have had only one object, i. e. to give the vendee a foothold in the village from which to resist pre-emption claims like the present.

Now it has undoubtedly been held that owners by purchase may come within the definition of Section 12, clause (4) of the Punjab Laws Act (*inter aliu Punjab Record*, No. 42 of 1880), but in those cases the purchaser had been held to have become one of the proprietary body and to have acquired rights as such. In 153 of 1888 Sir Charles Roe laid down clearly the principles which govern cases of this class. He says that Act IV of 1872 makes the basis of the right the position of the would-be purchaser as a member of a compact body the village community, and confers no right on any one else whatever may be the extent of his property, moveable or immoveable. In that case it was held that the purchase of a small portion of the village site—*abadi*—did not constitute the purchaser to be a landowner or landholder under the Act. We quite concur in this principle, which is in no way contravened by No. 7 of 1896, in which the purchaser of 100 *bighas* of *shamilat* land, regarding which it was doubtful if it could be cultivated and assessed to land revenue, was held to have a right of pre-emption against an entire stranger. Here the plaintiff is one of the old proprietary body with a considerable holding, and the defendant-vendee has to base his right on the doubtful purchase of a small portion of an unculturable pond or *chappar* carefully set aside as *ghair mumkin* at partition, and clearly carrying with it, notwithstanding the entry in the deed, no right to share in any culturable waste. We hold that the plaintiff has clearly established a superior right of

pre-emption over the defendant-vendee, and we think that to hold otherwise would be quite contrary to the spirit of the Act and the general custom recognized by the Act.

As regards the issue of notice to the plaintiff, both the lower Courts have concurred in finding that no notice was in fact served on plaintiff, and we see no reason to differ from this view. The appeal is accordingly dismissed with costs.

CHATTERJI, J.—I concur. There is no essential difference between the position of the vendee in this case and that of the vendee in No. 153, *Punjab Record*, 1888, who bought a small plot in the *abadi*. The land is not assessed to revenue, and as the village is at present constituted and under the agreement among the proprietors is absolutely incapable of individual possession or enjoyment. Its purchase therefore has not made the vendee a proprietor or landowner in the village, that is a member of the village community any more than the purchase in No. 153, *Punjab Record*, 1888, made the purchaser so. No doubt it is possible that the land may be broken up for cultivation and charged with revenue. In the same way it is possible that *abadi* land may become attached to the culturable land of the village and revenue be assessed on it. But we have to decide on existing facts and not on bare possibilities. It seems to me that if the decision in No. 153, *Punjab Record*, 1888, is correct under the Act, and its correctness has not yet been successfully challenged, and there is absolutely no doubt that it lays down the true principles which govern the right of pre-emption in villages, the vendee in the present instance is not entitled to pre-emption. No. 7, *Punjab Record*, 1896, was a case of a quite different character.

Appeal dismissed.

No. 97.

Before Mr. Justice Clark, Chief Judge, and Mr. Justice Gordon Walker.

GANDA MAL,—(PLAINTIFF),—APPELLANT,

Versus

THAKAR MAL AND ANOTHER,—(DEFENDANTS),—
RESPONDENTS.

} APPELLATE SIDE.

CASE No. 1190 of 1896.

Adoption of daughter's son—Hindu Law—Banias of Jagraon—Burden of proof—Omission to perform certain ceremonies.

Plaintiff sued for a declaration that a deed of adoption whereby defendant No. 1, plaintiff's brother, adopted his daughter's son, was invalid,

and would not affect plaintiff's reversionary rights. Plaintiff admitted the *factum* of adoption, but contended that it was illegal by "law and custom," and was, moreover, invalid owing to the non-performance of certain necessary ceremonies. The parties were *banias* of Jagraon. The lower Courts dealt with the question as one of custom, and dismissed the suit on the ground that the adoption had not been proved to be invalid by custom among the parties.

Held, that the parties being *bania* residents of a town, of the ordinary mercantile class, were governed by Hindu Law and not by custom, and that plaintiff had failed to prove that under Hindu Law a daughter's son was not a proper person to be adopted.

Held, further, that the *factum* of adoption not being disputed, and the daughter's son being a person who might legally be adopted, the adoption was not invalid on account of the omission of any particular ceremony.

I. L. R., XVII All., 294, *followed*.

Further appeal from the order of Captain C. S. Martinale, District Judge, Umballa Division, dated 29th June 1896.

Sant Ram, for appellant.

Lajpat Rai, for respondents.

The judgment of the Court was delivered by—

1st March 1899.

GORDON WALKER, J.—The question at issue in this case is the validity of the adoption by a sonless man of his daughter's son. Parties are *banias* of the town of Jagraon, and plaintiff, who calls the adoption in question, is the brother of defendant No. 1 who made the adoption. The first point that ought to have been considered by the lower Courts was whether the case was to be decided by Hindu Law or not. The two issues framed by the first Court were with regard to custom, and both Courts have apparently dealt with the question as one of custom. In their pleadings both parties rely on "law and custom," while defendant expressly alleges that the adoption is valid according to Hindu Law.

It seems to us clear that the rule of decision in this case is to be looked for in the Hindu Law, the parties being *bania* residents of a town, of the ordinary mercantile class. There is no allegation of any custom or usage superseding the Hindu Law, the word *rawaj* being apparently used by parties in a loose way (*rawajan wa kanunan*) so as to cover the usage followed by the class to which the parties belong, not necessarily a custom apart from the Hindu Law.

The question of the validity of the adoption amongst Hindus of a daughter's son was very fully considered in *I. L. R.*, XVII All., 294. We are prepared to accept the view of the majority of the Court which decided that case, that such an

adoption is not prohibited amongst the three regenerate classes, "and that consequently the *onus* of proving that such an adoption is prohibited by usage is upon him who alleges that it "is illegal." It is not, therefore, necessary to consider the other authorities in detail, but reference may be made to those bearing on the point which are quoted under para. 37 of the 5th edition of Rattigan's *Customary Law*. There is a distinction in the matter, it will be seen, between agriculturists and non-agriculturists, a daughter's son amongst the latter "being generally "recognized as a proper person to be adopted."

In the present inquiry six instances have been given of such adoptions in the town of Jagraon amongst *banias*, showing that the usage of the parties appears to be in accordance with the view of the Hindu Law which we are prepared to adopt.

The *factum* of the adoption is not denied; indeed it is alleged by the plaintiff, the only question raised being as to its validity. The adoption is stated to have been made from the time of the adopted son's birth, and it was confirmed by a registered deed, dated 15th November 1890. Important facts that may be noted in the case are that the adoptive father is the defendant who supports the adoption, and that at the time of institution of the suit the adopted son was nine years of age.

Some argument was addressed to us with regard to the invalidity of the adoption owing to the omission of certain ceremonies. In *I. L. R., VI All., 276*, the adopted son was a brother's child. But in the present case we are prepared to hold that the fact of adoption, *i.e.*, the giving and the taking of a son, not being in dispute, and the boy being one who might be adopted, the adoption would not be invalid on account of the omission of any particular ceremony.

For these reasons we agree with the lower Courts, and dismiss the appeal with costs.

Appeal dismissed.

No. 98.

Before Mr. Justice Anderson.

FATEH KHAN,—(PLAINTIFF).—APPELLANT,

Versus

MUHAMMAD & OTHERS,—(DEFENDANTS).—RESPONDENTS.

} APPELLATE SIDE.

Case No. 1288 of 1898.

Pre-emption—Death of claimant pendente lite—Abatement of suit—Muhammadan Law—Punjab Laws Act, 1872, Section 5.

The plaintiff in a suit for pre-emption died *pendente lite*, whereupon his sons were brought on the record and obtained a decree. On appeal the

Divisional Judge *proprio motu* dismissed the suit on the ground that by Muhammadan Law, which was the personal law of the parties, the death of a person who claimed pre-emption caused the abatement of the suit.

Held, that under Section 5 of the Punjab Laws Act, 1872, Muhammadan Law, even though the parties were Muhammadans, was inapplicable to a claim for pre-emption in respect of agricultural land, and that a suit for pre-emption brought by a landowner respecting village lands should not be regarded as a merely personal action which must terminate on the death of the original plaintiff and does not survive to his representatives.

Further appeal from the decree of Kasi Muhammad Aslam.

O. M. G., Divisional Judge, Jhelum Division, dated 8th August 1898.

Lal Chand, for appellant.

Harris, for respondents.

The judgment of the learned Judge was as follows :—

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ANDERSON, J.—In this case Sherun and Fateh Khan, sons of Malak Khan Muhammad, who died whilst prosecuting a pre-emption suit, were brought on the record and obtained a decree.

This was appealed to the Court of the Divisional Judge of Jhelum on the merits, but the learned Judge did not go into these, but took up a point not raised in appeal, *viz.*, that according to Muhammadan Law, which was applicable to the parties, the death of the person who claimed pre-emption caused abatement of suit, and he thereupon accepted the appeal and dismissed the suit as brought in the name of the sons.

In appeal it is urged that by the provisions of Section 5 of the Punjab Laws Act, pre-emption is not one of the questions where the Muhammadan Law can be made the rule of decision even although the parties concerned be Muhammadans. I think there is no doubt that this contention must be allowed to prevail and that a suit for pre-emption brought by a landowner regarding village land should not be regarded as a merely personal action which must terminate on the death of the original plaintiff and does not survive to his representatives who will occupy his exact position in the village community. The practice of the Courts has been to substitute parties in pre-emption suits and to continue to hear pending suits. No objection was taken before the learned Divisional Judge as to the substitution of Malak Khan Muhammad's son against law, nor was it alleged that the suit had abated on his death.

In this view of the case, after hearing counsel, I accept the appeal, reverse the order of the Divisional Judge as on a

preliminary point, and remand the appeal for decision on the grounds set out in memorandum. This order is under Section 562, Civil Procedure Code. Costs of this Court to be costs in the cause and to follow the event.

Appeal allowed: cause remanded.

No. 99.

Befors Mr. Justice Reid and Mr. Justice Gordon Walker.

MEHR CHAND,—(PLAINTIFF),—APPELLANT,

Versus

SYAD MUHAMMAD LATIF AND ANOTHER,—
(DEFENDANTS),—RESPONDENTS.

} APPELLATE SIDE.

Case No. 818 of 1896.

Joinder of parties—Suit by representative of deceased mortgagee, who has obtained certificate under Act VII of 1889—Necessity of impleading mortgagee's other heirs—Act VII of 1889, Sections 4, 16.

Plaintiff sued on the allegations that in 1883 defendant No. 1 mortgaged two houses to plaintiff's father for Rs. 2,000, and agreed to pay interest thereon at a specified rate, and the principal on demand; that plaintiff's father had died, and that plaintiff had obtained a certificate, under Act VII of 1889, for realisation of the debts due to the deceased, including the amount due on the said mortgage; that defendant No. 2 had purchased the said houses in execution sale with full knowledge of plaintiff's rights, and was now in possession thereof, and that defendant No. 1 despite demand had failed to pay the principal money or any interest since Sambat 1945. Plaintiff therefore prayed for recovery of a sum of Rs. 3,192 and costs, with a lien on the property mortgaged and recoverable by auction sale, and that defendant No. 1 be made personally liable for the amount of the decree and future interest. For defendants it was contended that the suit must fail by reason of the non-joinder as co-plaintiff of the deceased mortgagee's other son and co-heir, the latter being equally interested with plaintiff in the mortgage deed.

Held, that inasmuch as, according to the authorities, the relief sought in the present suit could not have been granted in its entirety without a certificate under Act VII of 1889, the certificate-holder, who represented the estate *qua* the particular debt just as fully as an executor or administrator, was entitled to sue alone without impleading the other heirs of the deceased mortgagee.

Further appeal from the decree of J. G. M. Rennie, Esq., Divisional Judge, Lahore Division, dated 4th May 1896.

Lal Chand, for appellant.

Grey, for respondents.

The judgment of the Court was delivered by

REID, J.—The summons issued to the legal representative of Wali Ji, respondent, who died on the 10th January 1897, 29th March 1899.

have been returned after service on Rajbai and Mussammat Jiwana Bai only. The pleader for the appellant, who is present in Court, states that he abandons his appeal against the other representatives of Wali Ji, in order that the appeal may proceed.

The first question for consideration is whether the suit must fail by reason of the plaintiff's brother, equally interested with him in the mortgage-deed sued on, executed in favour of their father, not having been joined as a party.

The suit was against the mortgagor and purchasers of his rights and interest, at execution sale, in the property mortgaged, which consists of two houses.

The relief sought was against the mortgaged property and the person of the mortgagor.

The plaintiff-appellant obtained a certificate, under Act VII of 1889, for realisation of debts due to his father, including the amount due on the mortgage in suit.

The first contention for him is that, inasmuch as he alone was entitled to obtain decrees for debts due to his father, and acquittance from him would afford, under Section 16 of the Act, full indemnity to all debtors as regards all payments made in respect of such debts, he was entitled to sue without joining his brother.

This contention has force.

Section 4 of the Act prevents a decree against a debtor of a deceased person for payment of his debt to a person claiming to be entitled to any part of the effects of the deceased, except on the production of *inter alia* a certificate under the Act having the debt specified therein, and Section 16 provides that the certificate shall be conclusive as against the persons owing such debts, and shall afford full indemnity to all such persons as regards all payments made in good faith in respect of such debts to the person to whom the certificate was granted.

Now there can be no doubt that payment of the sum due on the mortgage by the mortgagor to the plaintiff as certificate-holder would have absolved the mortgagor from liability to any other heir of the mortgagee, and the plaintiff's suit was properly framed against the mortgagor and the purchasers of the mortgaged property.

For the appellants reliance is placed on *Janaki Ballar Sen v. Hafiz Muhammad Ali Khan*, I. L. R., XIII Calc., 47, and *Fateh Okand v. Muhammad Bakhsh*, I. L. R., XVI All. (F. B.), 259, for the proposition that the relief sought could not have been decreed without a certificate.

For the respondents reliance is placed on *Raghu Nath Shaha v. Poresk Nath Pundari*, I. L. R., XV Calc., 54, *Kanchan Modi v. Baij Nath Singh*, I. L. R., XIX Calc., 336, and *Baid Nath Das v. Shamanand Das*, I. L. R., XXII Calc., 143, for the proposition that a certificate was unnecessary for the purposes of this suit, and that a suit by the certificate-holder alone could not succeed.

In XXII Calc., a suit was filed; without a certificate, by the heir of a mortgagee against the mortgagor, and the purchasers of the mortgaged property. The claim for recovery from the person of the mortgagor was dismissed, and that against the mortgaged property decreed. It was held that the absence of a certificate was not a bar to the decree against the mortgaged property in the hands of the purchaser, concurring in the dictum in XV Calc., that the purchaser of mortgaged property was in no sense a debtor to the mortgagee, and that a certificate was only necessary where a Court was asked to make a personal decree against a debtor. Reference was also made to the XIX Calc. case in which no personal decree was asked for against the mortgagors, although they were impleaded.

In each of these three cases the XIII Calc. ruling was distinguished on the ground that a personal decree against the mortgagor was asked for in that suit, while in them the relief sought was against the mortgaged property only.

In XVI All. the ruling in XIX Calc. was considered. The relief sought included a personal decree against the mortgagor, and the Full Bench held that money lent on the security of a mortgage is a debt due from the mortgagor to the mortgagee, although from the terms of the contract it may not be recoverable from the mortgagor personally, or except by a decree for sale of the mortgaged property, and that Section 4 of the Succession Certificate Act applies to suits for sale of the mortgaged property under Section 88 of the Transfer of Property Act.

Although that Act does not apply to this Province, the relief sought by the plaintiff was a decree for money "with a lien on the property mortgaged and recoverable by auction sale," so that the ruling is applicable.

The principle laid down in *Mussammatt Bhugobully Koor v. Bholanath Thakoor*, VIII W. R., 317, that the effect of a certificate under Act XXVII of 1860 to represent the estate of the deceased is that it is conclusive of the representative title against all debtors of the deceased, and affords full indemnity to all debtors paying debts to the certificate-holder, is embodied in Section 16 of the present Certificate Act above quoted.

Section 267, Act X, 1865, and Section 88, Act V, 1881, give an executor or administrator the same power to sue in respect of all causes of action that survive the deceased, and to exercise the same powers for the recovery of debts due to him at the time of his death as the deceased had when living, and Section 4, Act VII, 1889, places a certificate under the Act on the same footing as a probate or letters of administration, as regards a debt specified in the certificate.

We see no reason why a certificate-holder should not represent the estate, *qua* the particular debt, just as fully as an executor or administrator, and, holding on the authorities quoted that the relief sought in this suit could not have been granted in its entirety without a certificate, we hold that the certificate-holder could sue alone without impleading other heirs of the deceased mortgagee.

The next question for consideration is whether the appeal has abated so far as Rajbai and Mussammatt Jiwana Bai, legal representatives of Wali Ji, defendant-respondent, are concerned. The appeal was filed on the 15th July 1896.

Wali Ji died on the 10th January 1897, and application for bringing his legal representatives on the record was made on the 16th February 1898, the applicant alleging that he became aware of Wali Ji's death in September 1897. His pleader alleges that the delay between September and February was due to the appellant having considerable difficulty in discovering the legal representatives, who were in Bombay. An attempt was made to induce us to believe that Wali Ji lived at Bombay and died there, and that the appellant was consequently unaware of his death until eight months after its occurrence, but the appellant declined to adduce evidence on this point, and we are satisfied that Wali Ji lived and died at Lahore, and that the delay in applying to bring his legal representatives on the record is absolutely unaccounted for except by laches. The appellant is a Makhtar, residing at Lahore, and must be aware of the provisions of Sections 368 and 582 of the Code of Civil Procedure, and of Article 175 C. of the

second schedule to the Limitation Act, which he ignored, and as he has failed to satisfy us that he had sufficient cause for not making the application for substitution within the period prescribed, his appeal abates as against the legal representatives of Wali Ji.

Although the lower Appellate Court dealt with the question of consideration for the appellant's mortgage, and the question of the priority of the respondent, Sayad Muhammad Latif's mortgage, it arrived at no definite finding on these questions, and dismissed the suit on the ground that the appellant could not sue alone.

This being a preliminary point, we set aside the decree of the lower Appellate Court, and remand the appeal for decision of the remaining issues, under Section 562 of the Code of Civil Procedure, as between the appellant and the respondent, Sayad Muhammad Latif, whose costs will be costs in the cause, the Court-fee on the memorandum of appeal being refunded.

We note that no objection was taken by counsel for the respondents to the lower Appellate Court's finding, that the suit was not barred by the proceedings in the executing Court. The answering legal representatives of the respondent, Wali Ji, will be paid one set of costs by the appellant.

Full Bench.

No. 100.

*Before Mr. Justice Olark, Chief Judge, Mr. Justice Reid, and
Mr. Justice Gordon Walker.*

ZAFARYAH KHAN AND OTHERS,—(PLAINTIFFS),—
APPELLANTS,

Versus

FATTEH RAM,—(DEFENDANT),—RESPONDENT.

Case No. 690 of 1896.

} APPELLATE SIDE.

Res judicata—House and land sold by one deed of sale—Suit in respect of house—Subsequent suit in respect of land—Finding in first suit that deed of sale was void, effect of, as regards subsequent suit.

A. had a decree against B., and in execution thereof attached a house belonging to B., whereupon C. objected that B. had conveyed the house to him by a deed of sale which covered the house in dispute, and also a building site. The objection was disallowed, and C. was referred to a suit which he brought, and in which it was held that the sale by B. to C. was fictitious and in fraud of creditors, and was therefore invalid. Subsequently A. attached the building site, and C. again objected on the same ground as before. The objections having been again disallowed, C. filed the present suit to establish his right to the building site. The question referred to

the Full Bench was whether the decision in the first suit as to the validity of the sale was binding on the parties in the second suit.

Held, by the Full Bench, that though the subject matter of the second suit was different, in the sense that in the one suit a plot of land and in the other a house was claimed, yet the material issue, whether the sale deed conveyed a title or was fictitious and fraudulent, was identical in both suits, and that, therefore, the finding thereon in the first suit operated as *res judicata*, and precluded the issue which it had decided being raised again between the same parties in a subsequent suit, the latter suit being within the jurisdiction of the Court which decided the prior suit.

Further appeal from the decree of S. Clifford, Esquire, Divisional Judge, Delhi Division, dated 4th April 1896.

Madan Gopal, for appellants.

Grey, for respondent.

The judgments of the learned Judges of the Divisional Bench were as follows :—

16th Dec. 1896.

CLARK, C. J.—This case was argued before us on 12th and 14th December. Counsel present as before.

Mr. Madan Gopal produced a power-of-attorney purporting to be from plaintiffs to Prem Sukh, who had instructed Mr. Madan Gopal.

Mr. Grey said his client had not appeared, but that he had telegraphed that plaintiffs had not, as a matter of fact, authorized Prem Sukh to conduct the appeal.

We examined a witness before whom plaintiffs had executed and registered the power-of-attorney in favour of Ram Sukh, and we held that Mr. Madan Gopal was authorised to conduct the appeal on behalf of plaintiffs.

The facts of the case are fully stated in the order of the Divisional Judge.

It is Prem Sukh who is the real plaintiff in this case, and it will be convenient to deal with him as the plaintiff in the case.

The first question for decision is whether this suit is *res judicata*. The following is a brief general statement of the facts as far as they are necessary for deciding this point.

On 5th February 1883 Prem Sukh purchased from Mus-sammat Nur-ul-Nissa a *haveli* and some *sakni* land. Fatteh Ram, defendant, had a decree against her, and attached the *haveli*. Prem Sukh's objection to the attachment was disallowed, and he filed a suit to establish his right to the *haveli*. On the 27th November 1883 his suit was dismissed, it being held that the sale of the *haveli* was *farsi* in fraud of

the other creditors of Mussammat Nur-ul-Nissa. In 1894 Fatteh Ram attached the *sakni* land; Prem Sukh (or rather his vendees, plaintiffs) objected. The objection was disallowed, then this suit was filed, and the Divisional Judge has held that the decision of 1883 makes it *res judicata* that the whole sale both of *haveli* and *sakni* land was *farsi*.

On behalf of Prem Sukh it is urged before us that the previous case referred only to the *haveli*, and is not *res judicata* as regards the *sakni* land, and the following authorities are quoted, *Punjab Record*, No. 51 of 1894, *I. L. R.*, *XV Mad.*, 264, *XI Bom.* 355, *XIX Bom.*, 206.

The last case is very similar to the present, and the two Judges who decided the case took different views on the particular point now under discussion :—

Mr. J. Scott said : “The matter directly and substantially in issue now is the right to one piece of land, the matter directly and substantially in issue in the previous proceeding was the right to another and totally distinct piece of land. No doubt the evidence used by the plaintiff in both cases is the same, *viz.*, deed of sale. But the title to the entire property was not in question. The land formerly in dispute may have been so small as not to justify further litigation. The land now in dispute is considerable in extent and value. The question of title to the one may not have been worth the fighting. Does acquiescence in the decision regarding the one preclude any question as regards the other? Both the spirit and the letter of the section are against such an estoppel. The title to the entire property was not in question. Still less the title to the property now in dispute. Thus the matter now in dispute was not in question in the former proceedings. As it was not then in controversy, the defendant is not estopped from raising the question now.”

Mr. Justice Jardine, on the other hand, said : “The subject matter then in litigation was a different piece of land which the present deed of sale purported to convey to plaintiff along with the piece of land now in litigation. I am of opinion that the validity of that deed was a matter directly and substantially in issue between the present parties in the execution proceedings, 48 of 1885, and that the question was heard and decided by the subordinate Judge in that proceedings.”

The real question therefore is whether the validity of the sale as a whole was a matter directly and substantially in issue

in the 1883 case. The issue fixed in that case only concerned the *haveli*, and there was no issue as to the validity of the deed of sale.

The determination of the validity of the deed of sale was only important as regards the *haveli*, and any inference to be drawn from that finding as regards the *sakni* land, which was not then in dispute, is merely incidental: I would hold that that suit only decided as to the validity of the sale of the *haveli*, and left the question of the validity of the sale of the *sakni* land untouched.

Mr. Grey for Fattah Ram quoted *Law Report*, 12, *I. A.*, 16, *I. L. R.*, *XIII Bom.*, 32, and 15 *I. A.*, 66.

The two former were cases concerning, respectively, adoption and partition, where the status of the individual and of the family was concerned. The status must be determined once for all; it cannot be split up, as the property was in this case. These cases do not seem to me to be good precedents in this case. The last case quoted is one of an entirely different nature from the present case. I therefore hold that this claim to the *sakni* land is not *res judicata* by the decision of 1883.

With reference to the merits. The Divisional Judge held that there was nothing to show that the sale to Prem Sukh was fraudulent, and I agree with him. Mr. Grey does not deny that Prem Sukh was within his rights in trying to make an advantageous settlement of his debts at the expense of other creditors.

He urges that plaintiffs have no legal interest, and that if they have, the suit is really one for a declaratory decree, and that the case is such that the Court should exercise its discretion, and not grant a decree.

It is probable enough that Prem Sukh wanted to fight the case under cover of plaintiffs, thinking that they would be in a stronger position than he was, but I do not think that that is a matter of much concern to defendant. If Prem Sukh had chosen to give away his interests to plaintiffs, defendant would have had no *locus standi* to object. If plaintiffs are not put in any better position than Prem Sukh would have held himself, then defendant has no cause of complaint.

It is then argued that sale of 5th February 1883, taken together with the contemporaneous agreements, amounts to no more than a conditional mortgage. I have considered the deeds carefully, and am unable to accept the contention.

The sale was for Rs. 1,050, and Prem Sakh's undertaking to re-convey was only in case he got his whole debt, amounting to Rs. 1,900, paid back within a fixed time. It was further argued that the mortgage had been paid off, but absolutely no grounds for this contention were advanced. I would accept the appeal, and restore the decree of the first Court with costs throughout against Fattah Ram.

GORDON WALKER, J.—It is with some hesitation that I 24th Dec. 1898.
record my inability to agree with my learned colleague on the question of *res judicata* involved in this case. But the point is of some importance apart from this particular case, and the decision may be a precedent, so that I think it is well that it should be decided authoritatively by this Court.

To avoid confusion arising from the fact that Prem Sukh is not in name the plaintiff in this case, I will put the question as follows. A. has a decree against B. and attaches in execution a house belonging to B. C. objects that B. has conveyed the house to him by a deed of sale which covers the house in dispute and a building site. The objection is disallowed, and C. is referred to a suit which he brings. In that suit it is held that the sale by B. to C. is invalid because fictitious and in fraud of the creditors of B. Subsequently A. attaches the building site. C. objects on the same grounds as before, and is again referred to a suit which he brings, that is, the present suit. Is the first decision as to the validity of the sale binding on the parties in the second suit? In the case from which my learned colleague has quoted the learned Judges of the Bombay High Court appear to me to have taken diametrically opposite views. Mr. J. Scott appears to have held the view that it was merely a matter of using the same evidence (*i.e.*, the deed of sale) in the two cases; but I think that the more correct view was taken by Mr. J. Jardine, that the validity of the deed was a matter "directly and substantially in issue" between the parties in the previous case, and that it was heard and finally decided in that case. It does not seem to me to be material what issues were actually framed in the first suit. The matter directly and substantially in issue in both cases was the same, *viz.*, the validity of the deed of sale, and this was heard and finally decided by the Court in the first suit, the sale being held to be colorable. I do not see how it is possible to restrict the finding in the first suit to the property then in dispute, and to hold that the sale was then found to be colorable only as regards that. What the Court found in the first

suit was that the deed was invalid because the transaction was colorable, and applying that finding to the property then in dispute, it decided the case as regards that property, though the whole property was not then in dispute. There was none the less a final decision as to the validity of the deed, and that question having been put substantially in issue and decided cannot now be again put in issue between the same parties.

Of the authorities quoted that referred to above (XIV Bom., 206) is the only one really in point, and the final decision in that case was on other grounds. But I would refer to the remarks by Mr. J. Jardine just following those quoted by my learned colleague. "His (the Subordinate Judge's) decision has not been reversed. *If that decision had been a final decision in a suit as distinguished from this execution proceeding it would, in my opinion, have created estoppel by res judicata according to the authorities quoted by Mr. Branson, the fact that the present suit relates to a different piece of land not being a circumstance taking the decision out of that rule.*" (Here follow the authorities.)

Following this opinion I am inclined to hold that the learned Divisional Judge was right in deciding that the decision of 1883 declaring the sale to be colorable is binding on the parties.

24th Dec. 1898.

CLARK, C. J.—As my learned colleague differs from me I would suggest referring the case to a Full Bench on the question whether the decision of 1883 makes it *res judicata* that the *sakni* land now claimed was not validly sold to Prem Sakh.

GORDON WALKER, J.—I agree. Refer.

The following judgments were delivered by the learned Judges who constituted the Full Bench :—

29th March 1899.

REID, J.—The facts are fully stated in the judgment of the learned Chief Judge, so far as they affect the question of *res judicata*. *Dinkar Ballal Chakradeo v. Hari Shudhar Apte, I. L. R., XIV Bom., 207*, relied on by counsel on either side is not on all fours with the present appeal, in that the previous proceedings in that case were in execution, and no suit was filed to contest the order on the objection, which consequently became final under Section 283 of the Code of Civil Procedure. In the present case the plea of *res judicata* is based on the fact that a suit was instituted by the objector, and was dismissed on the ground that the sale under which

he claimed was fictitious and in fraud of creditors of the judgment-debtor, an issue having been framed on this point. The sale-deed purported to convey the property previously in suit and the property now in suit.

In the Bombay case *Scott, J.*, held that Section 13 of the Code did not bar the subsequent suit, because there was not the same subject matter in dispute in the two proceedings, different plots of land having been claimed and the title to the plot subsequently claimed not being in dispute in the former proceedings. For this reason he held that it was unnecessary to consider whether the decision in a proceeding in execution affected a claim in an independent suit.

Jardine, J., relying on authority, including *Pittapur Raja v. Buchi Sitayya*, *I. L. R., VIII Mad. (P. C.), 219*, held that if the previous decision had been a final decision in a suit, as distinguished from an execution proceeding, it would have created estoppel by *res judicata*, the validity of the deed which purported to convey to the plaintiff both plots of land being a matter directly and substantially in issue between the parties in the previous proceeding.

In the *Pittapur Raja's* case, in delivering their Lordships' judgment, *Sir Barnes Peacock* said: "It is true that the former suit did not relate to the same property as that which is the subject of the present suit, but the issue has been tried between them, by a Court of competent jurisdiction, whether *Buchi Tainaya* was adopted or not It was contended on the part of the plaintiff that the cases do not establish that an estoppel is binding unless the suit relates to the same subject matter, but it appears to their Lordships that the cases which have been referred to do not establish that position The issue which was tried in the former suit in this case was whether *Buchi Tainaya* was adopted by *Niladri Roi*, and the issue which the plaintiff wishes to try in the present case is the same, whether *Buchi Tainaya* was the adopted son of *Niladri Roi*. Their Lordships are clearly of opinion that the issue which was tried in the former suit is the same as that which the plaintiff wished to be tried in this suit, and that the plaintiff is estopped from making the allegation which he claims now to support."

In *Ananta Bala Oharya v. Damodhar Makund*, *I. L. R., XIII Bom., 25*, *Birdwood and Parsons, J.* said: "It cannot be held that the decision regarding the agreement of partition and

"on the question of partition affected only the piece of land
 "then in dispute, and left the defendants free to urge again,
 "in any subsequent suit, that the family was joint in all other
 "respects and as to all other property." In *Mussammot
 Kamini Debi v. Ashulosh Mukerji, I. L. R., XVI Cal. (P. C.)*
 103, Lord Hobhouse, in delivering their Lordships' judgments,
 said: "The question arises under the will which contains a
 "gift of the residue of his estate to a family idol . . . The sons
 "of Madha Sudon (the *shebait* of the idol) of whom the principal
 "appears to have been the present principal defendant, Ashu-
 "tosh, complained that he had made improperly a sale of part
 "of the testator's property to one Adhur Chander Bancap . . .
 "They also made the present plaintiff and other members of
 "the family parties to the suit, and the suit was in effect one for
 "establishing the will against everybody concerned . . . The
 "present plaintiff appeared to defend that suit . . . There was
 "not only an issue as to the genuineness of the will, but a further
 "issue whether or no the plaintiffs had any right to have in-
 "stituted the suit . . . The present plaintiff was not satisfied
 "with the decree (that the suit be decreed; that the will be
 "declared genuine), and she appealed to the High Court . . .
 "which dismissed the appeal with costs. Their Lordships take
 "that to be a decision that the will contains a gift of the entire
 "property to the idol, that the members of the family take only
 "maintenance from the offerings made to the idol, and that it
 "is a valid and legal gift in every respect. Now what is the
 "present suit? The present suit appears to their Lordships to
 "be founded upon the total, or at least the partial, invalidity of
 "the will. The first prayer of the plaint is, that upon a proper
 "interpretation of the will of the said Ram Koral Mukarji the
 "Court will be pleased to determine and settle those provisions
 "which are valid and lawful and those which are illegal and invalid
 ". . . She sues on the ground that there is some invalidity some-
 "where in the will, and that she, as heir-at-law, is entitled to take
 "advantage of it . . . The case is governed by Section 13 of Act
 "X, 1877, and the question is whether the point now raised is a
 "point heard and determined by the Court in 1863, in a suit in
 "which the present plaintiff was defendant, and the present
 "defendants were plaintiffs. Their Lordships' reasons have
 "been assigned for thinking that the question of the invalidity
 "of the will was a point decided in that suit; that it was de-
 "cided that the will was wholly valid, and passed the entire
 "estate to the idol, and that the same question cannot now be
 "raised."

In *Mowahaji v. Narayan Dhondhbat Pitre*, *I. L. R.*, *XI Bom.*, 355. West, J., in distinguishing between a suit for the forest or waste lands attached to a village and a suit for the cultivated lands of the same village said: "No doubt an adjudication or a material element of an adjudication between two parties is generally *res judicata* between them as to the same question arising between them in a future litigation. The identity of the question, however, may be affected by a difference of the corpus or object of the litigation, and also by a difference of the alleged infringement of the right (*causa petendi*) as well as of the right (*jus*) alleged by the plaintiffs, or of the persons or the character in which they take part in the litigation." His Lordship held that the difference between the law applicable to the forest as waste and that applicable to the cultivated lands constituted such a distinction that the decision in the prior case did not necessarily bar the subsequent suit.

In *Krishna Behari Roy v. Bunwari Lal Roy*, *I. L. R. I.*, *Calc.* (P. C.), 144, their Lordships of the Privy Council said: "By the general law, where a material issue has been tried and determined between the same parties in a proper suit, and in a competent Court as to the status of one of them in relation to the other, it cannot be again tried in another suit between them," and approved a *dictum* in *Soorjemonee Dayee v. Suddanund Mohapatte*, *XII B. L. R.* (P. C.), 304, that the general law relating to *res judicata*, founded on the principle *nemo debet bis vexari pro eadem causa*, defined by Lord Hardwicke, in *Gregory v. Molesworth*, 3 Stoyns, 626, as preventing a question which had necessarily been decided, in effect though not in express terms, between parties to a suit, being raised as between them in any other suit in any other form, must be applied in interpreting the provisions of the Code of Civil Procedure.

In *Pahlwan Singh v. Bisal Singh*, *I. L. R.*, *IV All.*, 55, a suit was filed for four instalments and interest due on a bond, interest being calculated from the date of execution. The defendants pleaded that interest ran only from date of default, but the claim was decreed. In a subsequent suit for subsequent instalments, with interest from the date of execution, it was held that the date from which interest should be calculated was *res judicata*. The judgment ran thus: "The subject matter, in the sense of the thing sued for, is, of course, different in each suit, but it is the 'matter in issue' not the 'subject matter' of the suit that forms the essential test of *res judicata* in the section. 'Matter in issue' is defined as matter from

“ which, either by itself or in connection with other matter, the existence, non-existence, nature or extent of any right, liability or disability asserted or denied in any suit or proceeding necessarily follows. (Indian Evidence Act, Section 3.) In the two suits of the parties now before us one common matter in issue was the question of the liability of the obligors of the bond, in regard to the amount of interest secured thereby. That question was determined in the previous suit and cannot be re-opened now.”

In *Chundu v. Kunhamed*, I. L. R., XIV Mad., 324, a suit was filed by certain members of a family against other members for their shares of certain property. One of the defendants pleaded that a *paraniha*, part of the property in suit, was impartible, and on issue framed the *paraniha* was held to be partible. In a suit filed by the mortgagee of one of the defendants for possession of the mortgagor's share, the plea was again raised that the *paraniha* was impartible. The Court held that the question was *res judicata*.

In *Shib Charan Lal v. Raghunath*, I. L. R. XVII All., 174, a suit was filed for a declaration of the plaintiff's right to possession of certain property as heir of the last owner. The suit was dismissed on the ground that the plaintiff was out of possession, and could not obtain a declaratory decree, but the issue of title was decided in his favour. The plaintiff then sued for possession, and it was held by Edge, C. J., and Bannerji, J., that the question of title was not *res judicata*, the finding that the plaintiff was not in possession being fatal to his suit; and no finding on the question of title being necessary the judgment proceeded: “ For findings to operate as *res judicata* they must have been findings upon which the decree or some operative part of it was made, and must have been findings which were necessary for the making of the decree in the way in which it or some operative part of it was made, and it is the decree read in the light of such findings.....which finally, within the meaning of Section 13, Act XIV of 1882, decides the matter in issue, or which might or ought to have been in issue, between the parties in the suit (Explanation II). The result appears to us to be that a finding in a judgment to operate as *res judicata*, the Court being a Court of jurisdiction competent to try the subsequent suit, must be material and necessary to support the precise and particular ground or grounds on which the decree or some operative part of it was made. The finding of fact, to operate as *res judicata*, need not

“have been the sole finding of fact upon which the decree was made, but it must have been a material and necessary finding of fact, material and necessary in the sense that the fact must have been found as it was found in the judgment, and could not have been found otherwise, for the decree as it was made to have been a good result in law from the fact or facts so found. Further, if there were two findings of fact, either of which would justify in law the making of the decree which was made, that one of such two findings of fact which should, in the logical sequence of necessary issues, have been first found, and the finding of which would have rendered the other of such two findings unnecessary for the making of the decree which was made, is the finding which can, in our opinion, operate as *res judicata*.”

In the present suit the plaintiffs claimed under the sale-deed, which was set up in the previous suit, having purchased from the original purchaser-plaintiff. The issues framed in the previous suit were :

- (1). Was the attached property Mussammat Nur-ul-Nissa's?
- (2). Were the sale (by Karam Bakhsh as Mussammat Nur-ul-Nissa's agent to the plaintiff) and mortgage executed in good faith or in fraud of creditors ?
- (3). Was Karam Bakhsh authorised to sell ?

The findings were that the sale of the house and land by Mussammat Nur-ul-Nissa in favour of the plaintiff was fictitious, and that Karam Bakhsh merely executed the sale-deed in collusion with the plaintiff to defraud creditors.

These findings were fatal to the claim, which was based on the sale-deed, and would be fatal to the subsequent suit based on the same sale-deed. The question for consideration is whether the genuineness of the sale is saved from being *res judicata* by reason of the subject matter of the previous suit having been the house, and that of the present suit being the land which the sale-deed purported to convey.

It has been contended for the appellant that most of the authorities quoted deal with status, and that the question now before the Court arises out of contract not out of status.

On the other hand, it has been contended that the title was in issue in both suits, and that a decision that the title deed is invalid precludes any further question of the validity of the title deed between the same parties

Now it appears to me that the only judgments deciding status which have a greater effect than other judgments in barring a subsequent decision on the same issue are those dealt with by Section 41 of the Evidence Act. These are final judgments, orders or decrees of competent Courts in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction, and are commonly known as judgments *in rem*, being conclusive "against the whole world" as to the legal character or title in question. All other judgments are *inter partes*, and are conclusive only against specific parties, *i.e.*, parties and privies.

It appears to me to be immaterial whether the finding of fact is that a certain deed of partition was executed, or that a certain adoption was effected, or that a certain sale-deed was executed in good faith and for consideration, for the purposes of the application of the rule of *res judicata*. If the finding was, to use the words of Edge, C. J., material and necessary to support the precise and particular ground on which the decree was made, it operates as *res judicata*, and precludes the issue which it decided being raised again between the same parties in a subsequent suit, provided the subsequent suit is within the jurisdiction of the Court which decided the prior suit.

Here there is no contention that the parties are not identical, or that the suit is not within the jurisdiction of the Court which decided the prior suit.

To hold that an attaching creditor, in whose favour it has been held that a deed of sale under which an objector claimed does not convey a title, may be put to the trouble and expense of having the same question decided in a suit instituted against him by the same party in the same Court, for another part of the property which the sale-deed purported to convey, appears to me a violation of the rule *nemo debet bis vexari*. The subject matter of the second suit may be different in the sense that in the one suit a plot of land and in the other a house was claimed, but the material issue, whether the sale-deed set up conveyed a title or was fictitious and fraudulent is identical. An adverse decision on this issue would conclude the plaintiffs' suit, and would obviate the necessity of deciding any other issue.

For these reasons I would dismiss the appeal and dismiss the suit, holding it to be barred by Section 13, Act XIV of 1882, and order the appellant to pay his own and the respondent's costs in all Courts.

CLARK, C. J. (GORDON WALKER, J., concurring).—On 29th March 1899. further consideration and after carefully weighing Mr. Justice Reid's judgment I think the better view is that the validity of the sale as a whole was a matter directly and substantially in issue in the 1883 case, and that the question is *res judicata*.

The authorities have been fully discussed by my learned colleague, and I have nothing further to add.

The appeal is therefore dismissed with costs.

Appeal dismissed.

CRIMINAL JUDGMENTS,
1898.

Chief Court of the Punjab.

CRIMINAL JUDGMENTS.

No. 1.

Before Sir Charles Roe, Kt., Chief Judge, and Mr. Justice Reid.

MUSSAMMAT TABAN,—(ACCUSED)—PETITIONER,

Versus

QUEEN-EMPRESS,—RESPONDENT.

} REVISION SIDE.

Case No. 2389 of 1897.

Criminal Procedure Code, 1882, Sections 337, 339, 436, 537—Tender of pardon to accomplice—Sessions Judge withdrawing pardon and committing accomplice for trial—Authority of Magistrate to tender pardon.

Two women were suspected of the murder of one K. S., and it appeared from the record that a Magistrate of the 1st class tendered a pardon (which was accepted) to one of them, Mussammat T., before the case was *chalaned* to him by the Police, and committed the other, Mussammat D., to the Sessions Court for trial on a charge of murder. Mussammat T. gave evidence as a witness against Mussammat D., both before the committing Magistrate and in the Court of Sessions. The Sessions Judge, in acquitting Mussammat D., directed the withdrawal of Mussammat T.'s pardon, which he also found to have been given without proper authority, and her commitment for trial on a charge of murder. Mussammat T. applied to the Chief Court to set this order aside.

Held, that the order of the Sessions Judge must be regarded as one under Section 436 of the Criminal Procedure Code, for, although there had as yet been no formal discharge of Mussammat T., yet, as she had been ordered to be placed on bail by the Magistrate as required by Section 337 of the Code, she must be regarded as an accused person till the close of the trial of Mussammat D., when there would necessarily be either a formal order for her discharge or for her commitment for trial, and it was then competent for the Sessions Judge, if he thought proper to direct, under Section 436, her commitment without waiting for a Magistrate to formally, and in the opinion of the Sessions Judge improperly, discharge her.

Section 339, Criminal Procedure Code, makes no provision for the mode in which a pardon is to be withdrawn, and the Magistrate or Court who could have placed the person accepting the pardon on his trial in the first instance, is competent to do so notwithstanding the pardon, if such Magistrate or Court considers that the conditions of the pardon have not been fulfilled. When the person holding the pardon is placed on his trial, he will first plead his pardon, and if he proves that it was

in fact granted, he will be entitled to an acquittal unless the prosecution proves that (1) the accused has wilfully concealed material facts, or (2) has given false evidence.

When a pardon has been tendered and accepted in good faith, the fact that the Magistrate had no power to tender such pardon is a defect expressly cured by Section 537 of the Code.

*Petition for revision of the order of Kazi Muhammad Aslam
O.M.G., Sessions Judge, Lahore Division, dated 18th August
1897.*

The judgment of the Court was delivered by

21st Jan'y. 1898.

ROX, C. J.—From the order of the Sessions Judge it appears that two women, Mussammat Dewan and Mussammat Taban, were suspected of the murder of one Kharak Singh by administering to him arsenic; that a pardon was tendered to and accepted by Mussammat Taban under Section 337, Criminal Procedure Code, and she gave evidence as a witness against Mussammat Dewan both before the committing Magistrate and in the Court of Sessions. The Sessions Judge, in acquitting Mussammat Dewan, has directed the withdrawal of Mussammat Taban's pardon, which he also finds to have been given without proper authority, and her commitment for trial on a charge of murder. Mussammat Taban applies to this Court to set aside this order.

We think that the order of the Sessions Judge should be looked on as one under Section 436, Criminal Procedure Code,—that is as one ordering the commitment of a person who has been improperly discharged by a Magistrate. It is true that there has as yet been no formal discharge of Mussammat Taban, but she was ordered to be placed on bail by the Magistrate as required by Section 337, Criminal Procedure Code, and she must be regarded as in the position of an accused person down to the conclusion of the trial of Mussammat Dewan. At the close of that trial, there would necessarily be either a formal order for her discharge or for her commitment for trial. And it appears to us that if the Sessions Judge thought she ought to be committed for trial, he could, under Section 436, Criminal Procedure Code, have directed this without waiting for a Magistrate to formally, and in the opinion of the Sessions Judge improperly, discharge her.

Section 339 makes no provision for the mode in which a pardon is to be withdrawn, and the reason no doubt is that no special provision is necessary. The Magistrate or Court who could have placed the person accepting the pardon on his

trial in the first instance is competent to do so notwithstanding the pardon, if the Magistrate or Court considers that the conditions of the pardon have not been fulfilled. When the person holding the pardon is placed on his trial, he will first plead his pardon. If he proves that it was in fact granted, then the prosecution will have to show that (1) the accused has wilfully concealed material facts, or (2) given false evidence. If the prosecution fails to do this, the accused would be entitled to an acquittal.

We think we should be justified in interfering on Revision with an order directing the trial of an accused person holding a pardon if there is no good *prima facie* proof that the conditions of the pardon have been broken.

In the present case we may first briefly dispose of the objection put forward by the Sessions Judge that the pardon itself was irregular, as Mr. Abbott, the Magistrate who granted it, had no power to do so. Mr. Abbott was a Magistrate of the first class in charge of the Kasur Sub-Division, and he eventually committed the case for trial. It is true that he tendered the pardon before the case was "chalaned" to him by the Police, and it does not appear that he was specially authorized by the District Magistrate to tender the pardon. It is probable that Mr. Abbott was enquiring into the case before it was "chalaned" to him by the Police (see *Punjab Record* No. 3 of 1877, Criminal), but it is not necessary for us to enquire further into the facts, as there can be no doubt that the pardon was tendered and accepted in good faith, and even if Mr. Abbott had no power to make the tender, the defect is expressly cured by Section 537, Criminal Procedure Code.

As to whether there is *prima facie* proof that Mussammat Taban has (1) wilfully kept back the truth, or (2) given false evidence, the finding of the Sessions Judge apparently is not that she has wilfully concealed anything, but that she has given false evidence by stating that Bahadar was present when she and Mussammat Dewan were grinding and mixing the arsenic, whereas she originally stated only that he was present when Mussammat Dewan gave the "khir" to Kharak Singh. The Sessions Judge considers that the addition was made in order to strengthen the case against Mussammat Dewan. This may be so, but the Sessions Judge is mistaken in saying that there is a discrepancy between her own and Bahadar's statements on the point before the committing Magistrate and at the trial. The record shows that on both occasions both

Mussammat Taban and Bahadar stated that the latter was present at the mixing or kneading. The statement may very probably be false, and the fact that it was not made in an original statement to the Police, or elsewhere, would be a good reason for distrusting it. But it certainly cannot be said that there is actual proof that it is false. And even if it were proved, we should hesitate to allow the accused to be placed on her trial for murder merely because she had at the instigation of the Police made a slight addition to her first statement, in order to strengthen the case for the prosecution.

We, therefore, set aside the order directing that Mussammat Taban be committed for trial and order her discharge.

Application allowed.

No. 2.

Before Mr. Justice Frizelle.

AJMAL SHAH,—(ACCUSED),—PETITIONER,

Versus

QUEEN-EMPRESS,—RESPONDENT.

Case No. 2779 of 1897.

Criminal Procedure Code, 1882, Section 110—Security for good behaviour—General reputation—

For a man to have a bad general reputation it is not necessary that there should be no one to give him a good character, but it is necessary that the evidence should be so strong as to leave no doubt what a man's general repute is. When, therefore, as good witnesses come forward to state that a man's reputation is good as those who state the contrary, it cannot be said that his reputation is bad, unless there is something to corroborate the witnesses against him.

No. 2, *Punjab Record*, 1897, Criminal, *explained*.

Petition for revision of the order of Captain P. S. M. Burlton, District Magistrate, Jhang, dated 8th September 1897.

Oertel, for petitioner.

Sinclair, Government Advocate, for respondent.

The judgment of the learned Judge was as follows :—

5th Feby. 1898.

FRIZELLE, J.—I think I cannot help revising the order in this case and Alam Sher's. Petitioner has been found to be an habitual receiver of stolen property on evidence of general repute. On considering that evidence and the evidence for the defence, I do not think that it is proved that he is by general repute an habitual receiver of stolen property. There is, in my opinion, far better evidence that this is not his reputation than that it is. The evidence against him is

largely that of persons admitted to be his enemies. The chief witnesses against him now were the chief witnesses against him when he was charged with being an habitual offender and acquitted in 1896. He was acquitted then on the ground that the case was got up by his enemies, and that he was proved to be a man of good character. A perusal of that judgment is sufficient to show that it was a very proper one, and I do not think anything but fresh facts coming to light, or good proof of subsequent crime being attributed to him, would justify the requisition of security so soon after that order. A great many witnesses have been called to prove that he bears a good reputation. For a man to have a bad general reputation, of course it is not necessary that there should be no one to give him a good character, and this was not the meaning of *Punjab Record* No. 2 of 1897. But it is necessary that the evidence should be so strong as to leave no doubt what a man's general repute is. When as good witnesses come forward to state that a man's reputation is good as those who state the contrary, it can hardly safely be held that that man's general reputation is bad, unless there is something to corroborate the evidence of the witnesses against him.

In the present case, I think, the witnesses for the defence are more trustworthy than those for the prosecution, as several of the latter are proved to be influenced by enmity, while the former include many respectable persons whose evidence I do not see equal reason for distrusting.

It is admitted that petitioner (Ajmal Shah) has never been convicted of any offence, and that no stolen property has ever been found with him. This alone is sufficient to throw doubt on the evidence of his being an habitual offender. The only thing against him is that security was taken from him in 1884, and again in 1890, and it should be assumed that it was rightly taken from him; but this is quite insufficient to prove that he is now an habitual offender. I neither believe that he is proved to be at present an habitual receiver of stolen property, nor that he bears the general repute of being such.

As to Alam Sher, the case is very much the same. Only it is on the whole weaker. He also has never been convicted or found in possession of stolen property, and he has never been required to give security. He is a near relation of Ajmal Shah, and there is every reason to fear that he has been prosecuted merely in consequence of that relationship. I accept both petitions and discharge petitioners from their security.

Application allowed.

No. 3.

Before Sir Charles Roe, Kt., Chief Judge, and Mr. Justice Stogdon.

QUEEN-EMPRESS.

Versus

BATERA AND OTHERS,—(ACCUSED).

Case No. 2838 of 1897.

REVISION SIDE. }

Criminal Procedure Code, 1882, Sections 30, 35, 337, 380—Omission by District Magistrate to submit sentences passed by him for confirmation by Sessions Judge—Appeal by accused to Sessions Judge—Procedure—District Magistrate at whose instance pardon was tendered to approvers trying case himself—Penal Code, Section 395.

The District Magistrate of Gurgaon, with enhanced powers under Section 30 of the Criminal Procedure Code, charged certain persons with three separate offences of dacoity, and tried them for the same at one trial. He convicted four of the accused, and passed on them aggregate sentences of 5, 7, 7 and 5 years, respectively, but overlooked the fact that, under Section 35 of the Code, such sentences were single sentences requiring confirmation of the Sessions Judge, and did not submit them for confirmation. The accused appealed to the Sessions Judge, who submitted the files to the Chief Court, with a recommendation that the convictions should be quashed on the revision side, and the District Magistrate directed to commit the accused to the Sessions. The principal ground for the recommendation was that the District Magistrate, having tendered a pardon to two 'approvers,' and having examined them, was, by the last paragraph of Section 337 of the Code, incapacitated from trying the case himself. It appeared that the pardons were tendered to the approvers by a Magistrate of the 1st class at the instance, or with the sanction, of the District Magistrate, and that the approvers were examined by the former Magistrate, and were subsequently examined by the District Magistrate in the course of the trial.

Held, that the omission by the District Magistrate to duly submit the sentences for confirmation could not operate to change the course of appeal, and that the Sessions Judge, on having the cases brought to his notice through the medium of an appeal, should have proceeded to exercise his confirmatory jurisdiction under Section 380 of the Code, whereupon the appeals would have lain to the Chief Court under Section 408.

Held further, that the provisions of Section 337 of the Code must be construed strictly, and that the disqualification created by the last paragraph applies only to that Magistrate before whom the suspected person is brought face to face, and who attempts to induce him by promise of pardon to make a full and true disclosure, the examination referred to in the said paragraph being the one made on the tender of the pardon and directly resulting from it, and not the examination of the approvers in the course of the trial.

*Case submitted for orders by S. Olifford, Esquire, Sessions Judge,
Delhi Division.*

Sinclair, Government Advocate, for respondent.

The order of the Court was as follows :—

STODDON, J.—The Magistrate of the Gurgaon District, 14th Feby 1898. with enhanced powers under Section 30, Criminal Procedure Code, charged Batera, Kauda, Mirza, Sukhram, Alfu, Shitabi and Nanga with three separate offences of dacoity at (1) Piao Kassuli, (2) Danwapur, and (3) Sultanpur, under Section 395, Indian Penal Code, and tried them for the same at one trial. He passed upon Batera, Kauda, Mirza and Alfu aggregate sentences of 5, 7, 7 and 5 years, respectively, but overlooked the fact that under Section 35, Criminal Procedure Code, such sentences were single sentences requiring confirmation of the Sessions Judge, and did not submit them for confirmation. The convicts appealed to the Sessions Judge, who submitted the files to this Court with a recommendation that the convictions should be quashed on the revision side, and the District Magistrate directed to commit the accused to the Sessions. The principal ground for the recommendation is that the District Magistrate having tendered a pardon to Har Chand and Hamida, and having examined them, was, by the last paragraph of Section 337, Criminal Procedure Code, incapacitated from trying the case himself. It was contended before the Sessions Judge that the appeals all lay to his Court, because the District Magistrate did not pass the sentences subject to its confirmation, and the accused were undergoing imprisonment under his sentences, but an omission on the part of the District Magistrate to comply with the clear provisions of the law and to submit the sentences for confirmation cannot operate to change the course of appeal. We consider that the Sessions Judge, on having the cases brought to his notice through the medium of an appeal, should have proceeded to exercise his confirmatory jurisdiction under Section 380, Criminal Procedure Code. All appeals in the case would then have lain to this Court under the provisions of Section 408, but, as matters stand, they cannot be presented because the case has not been disposed of by the Court of Session.

It appears that pardons were tendered to Har Chand and Hamida by Rai Lachhman Das, a 1st class Magistrate, at the instance, or as the Magistrate expresses it, with the sanction, of the District Magistrate, and that they were examined by Rai Lachhman Das. We think that the provisions of

Section 337, Criminal Procedure Code, must be construed strictly, and that the disqualification created by the last paragraph applies only to that Magistrate before whom the suspected person is brought face to face, and who attempts to induce him by promise of pardon to make a full and true disclosure. Such Magistrate to a certain extent assumes the functions of a police officer, and identifies himself with the prosecution, and it was doubtless on that account that it was considered proper to disqualify him from trying the case. As regards the examination, we think that a distinction may be drawn between the examination made by the pardon-tendering Magistrate, which is equivalent to a police examination, and that made by the Magistrate trying the case, and we do not think that the examination of the approvers made by the District Magistrate in the course of the trial is one of the nature referred to in the last para. of Section 337. That examination appears to be the one made on the tender of pardon, and directly resulting from it.

For the above reasons we cannot accede to the recommendation of the Sessions Judge, and we return the cases to him, and request that he will dispose of such sentences as require confirmation under Section 380, Criminal Procedure Code, and thereafter submit the appeals for the orders of this Court. This order governs also the trial of the Burhia Kamalpur and Main Batauri dacoity cases (Chalan No. 2), in which sentences requiring confirmation were passed on Alfu and Batera.

In the Chainawali case (Chalan No. 3) the appeal lies to the Sessions Judge, who must dispose of it.

No. 4.

Before Mr. Justice Stogdon and Mr. Justice Reid.

SUKHA,—(ACCUSED),—PETITIONER,

Versus

QUEEN-EMPRESS,—RESPONDENT.

} REVISION SIDE.

Case No. 1722 of 1897.

Criminal Procedure Code, 1832, Section 110—Security for good behaviour—General repute—Evidence—Personal knowledge of Magistrate.

Accused, who was a lambardar of Kalian in the Chiniot *tahsil*, was ordered by the Magistrate to execute a bond for Rs. 1,000, with two sureties, for his good behaviour for a period of three years. It appeared that twenty-one persons gave evidence to the effect that accused was a habitual receiver of stolen property, while thirty-eight persons testified that he was by general repute a man of unblemished character. The order of the Magistrate was confirmed on appeal by the District Magistrate, who concluded his judgment by stating that he personally knew the accused to be a well-known receiver of stolen property, knowing it to be stolen. The accused applied to the Chief Court on the revision side.

Held, that the burden of proving an accused's bad character lies on the prosecution, and that, therefore, when the evidence on both sides is, as the Court found to be in the present case, of an indifferent and interested character, the prosecution must fail.

Evidence as a rule should be tested by its quality rather than by its quantity.

Held, further, that the case should have been decided solely on evidence taken in Court, and that the District Magistrate was not entitled to rely on his own personal knowledge.

The law regarding security for good behaviour is a hard law, which can easily be used as an instrument of oppression, and should not, therefore, be enforced except on the best possible grounds. It is incumbent on Magistrates in such cases to exercise the greatest caution and impartiality, and to be careful not to be influenced by outside gossip and vague rumour.

*Petition for revision of the order of Captain P. S. M. Burlton.**District Magistrate, Jhang, dated 4th May 1897.*

Muhammad Shafi, for petitioner.

Robinson, Junior Government Advocate, for respondent.

The judgment of the Court was delivered by

Stogdon, J.—On the 23rd March last Lala Tikkan Lal, a 1st class Magistrate in the Jhang District, required Sukha, caste Haral, lambardar of Kalian in the Chiniot *tahsil*, to execute a bond for Rs. 1,000, with two sureties, for his good behaviour for a period of three years. This order was confirmed.

28th Feby. 1898.

by the District Magistrate on appeal. Sakha has applied to this Court on the Revision Side to set it aside.

The Magistrate found that "overwhelming evidence has been produced against him to the effect that he is an habitual receiver of stolen property and disposes of it in the adjoining districts of Gujranwala, Montgomery and Shahpur, and the stolen property of those districts passes through his hands and is disposed of in this and other districts. It is not proved that he himself commits thefts, but it is sufficiently proved that he is a big *rassagir*, and through his relatives Bagga, Muhammad, Muhabbata and othershe gets cattle lifted, and through him the stolen property passes to the adjoining districts."

Twenty-one witnesses were examined for the prosecution and thirty-eight for the defence. It appears that in 1896, Syed Jalal resigned, the *saildari* of Kot Khuda Yar and accused along with others applied for the appointment. Saleh Shah, son of Syed Jalal, obtained it, but accused's action in opposing him is said to have offended him and other influential Syeds, who on that account gave evidence that he was a man of bad character. The judgment of the Magistrate shows that he did not place much reliance on their evidence, but he considered that without it there was sufficient and overwhelming evidence which proved beyond doubt that accused was a "big *rassagir*." He disposed of the evidence for the defence with a remark that it was not difficult for accused and his brother Shujawala, *saildar*, to produce any number of witnesses or headmen and make them say anything they chose. The District Magistrate apparently believed the evidence for the prosecution, for he recorded that the plea of enmity cuts both ways, that a disinterested witness is an unknown quantity in this country, and that he did not consider that any Court was justified in rejecting evidence on that ground alone. He, however, proceeded to reject the whole of the evidence for the defence on that ground, for it was, he said, such, as men in accused's position could always produce, i.e., it was not disinterested. He accounted for accused's former immunity from prosecution on the ground of his influence and position and the supineness of the authorities, and concluded his judgment by stating that he personally knew the accused to be a well-known receiver of stolen property, knowing it to be stolen.

The prosecution witnesses may be divided into three groups, viz. :—(1) officials, (2) Syeds, (3) others. The officials

witnesses are Nos. 1, 9, 16, 17, 18, 19, 20 and 21. The Syeds are Nos. 2, 3, 11, 13, 14 and 15. The others are Nos. 4, 5, 6, 7, 8, 10 and 12. The Magistrate attached little or no weight to the evidence of the Syeds, because they were undoubtedly actuated by inimical motives. Of the others Nos. 5, 6 and 8 are enemies of accused and No. 10 is a friend of Syed Jalal. There remain the official witnesses and Nos. 4, 7 and 12. Of the official witnesses the most important are No. 9 Ahmed Khan, Deputy Inspector of Chiniot, No. 19 Mihr Singh, Sergeant, stationed at Chiniot, and No. 21 Wariam Khan, Tracker Sergeant, also stationed at Chiniot. Ahmed Khan had, however, to admit that he had been in charge of the Chiniot police station for a short time only, so his evidence was not of much value. The evidence of No. 16 Sheikh Amir-din, Tahsildar of Chiniot, was worth little or nothing. He said that during the course of the *suiddari* case he had made enquiries regarding accused's character and that the result was unfavourable to him, but whether he inquired solely from accused's enemies does not appear. The evidence of other police officers who are stationed in other police stations and who never received any complaints against accused, is obviously of little weight. The most important evidence is, perhaps, that of witnesses who state that they lost cattle, suspected accused's relatives or servants of having stolen them and went to accused who demanded money, which they never paid, and made promises of restoration, which he never kept. None of them ever reported their losses to the police, except perhaps Mir Dad No. 12, who said that he lost two buffaloes and petitioned the District Magistrate about them, but did not appear to prosecute his petition, because the accused promised to restore them. Considering accused's position and influence, the probability is that he was often asked to assist in the recovery of cattle, either stolen or strayed. It is possible that he may have demanded money for his services, but a few isolated causes of this kind are not sufficient to prove that he is an habitual receiver of stolen property. Of his witnesses seventeen are *lawbardars* and seven Hindu shop-keepers and money-lenders. Possibly many of them know little or nothing about him and gave evidence merely because he asked them to oblige him, but the burden of proving accused's bad character was on the prosecution, and it can hardly be maintained that the charge against him was established by the evidence of interested officials, inimical Syeds and disappointed owners of stolen cattle. If it be assumed that the whole of the witnesses for

the prosecution and defence are disinterested, then the conviction can hardly be maintained, for twenty-one persons say that accused is by general repute a receiver of stolen property, while thirty-eight say that he is by general repute a man of unblemished character. Evidence should as a rule be tested by its quality rather than by its quantity. In the present case the quality on both sides appears to be indifferent and the prosecution must therefore fail. Assuming that the quality on both sides is good, it must also fail, because the evidence for the defence altogether outweighs that for the prosecution. The case is one which must be decided on evidence taken in Court just like all other criminal cases, and the District Magistrate was not entitled to rely on his own personal knowledge. It has several times been pointed out by this Court that the law regarding security for good behaviour is a hard law, which can easily be used as an instrument of oppression, and which should not be enforced except on the best possible grounds. It is to be feared that it is often resorted to as a means of ensuring the punishment of persons suspected, but not proved to have committed offences such as thefts, house-breaking, &c., and it is notorious that accusations of bad livelihood are constantly made, merely with the object of blackening an enemy's character and of satisfying feelings of spite and hatred. Under such circumstances it is incumbent on Magistrates to exercise the greatest caution and impartiality, and to be careful not to be influenced by outside gossip and vague rumour. The judgments of the Magistrates in this case are of such a nature as to give rise to a suspicion that they did not approach the decision of the case with entirely unprejudiced minds.

As we do not consider that the order demanding security was justified, we set it aside.

No. 5.

Before Mr. Justice Chatterji.

JIWAN,—(ACCUSED),—PETITIONER,

Versus

QUEEN-EMPRESS,—RESPONDENT.

} REVISION SIDE.

Case No. 366 of 1898.

Gambling Act, 1867, Sections 8, 11—Confiscation of property belonging to person acquitted on trial.

The words "on conviction" in Section 8 of the Gambling Act, 1867, are intended to confer jurisdiction to order forfeiture only in cases where there is a conviction, and clearly mean that it cannot be exercised where there is no conviction. Nor, even where there is a conviction, is the power to order forfeiture unlimited, such power being necessarily restricted to property belonging to convicted persons, and not extending to property belonging to persons sent up for trial but acquitted under Section 11 of the Act.

Petition for revision of the order of Sardar Charat Singh, Magistrate, 1st class, Sialkot, dated 11th December 1897.

The following judgment was delivered by

CHATTERJI, J.—The petitioner was one of the persons sent **15th April 1898.** up for trial by the Police under the Gambling Act, 1867, but was at their recommendation examined as a witness. The Magistrate believed that he made a true and faithful discovery to the best of his knowledge of all matters as to which he was examined. Under Section 11 of the Act, on which the Magistrate acted, petitioner was entitled to a certificate in writing to the above effect from him, and to be indemnified against all prosecution under the Act for anything done up to that time. The Magistrate, however, recorded an order of acquittal.

The Magistrate passed an order of confiscation of all property seized by the Police when they made their raid on the gaming-house. A gold and a silver ring, a small knife and a *Nawak Shah* copper coin were recovered from the person of the petitioner during the search, and the present application is for setting aside the order of confiscation with respect to them.

Section 8 of the Gambling Act empowers the Magistrate, on the conviction of any person for keeping or using any common gaming-house within the meaning of the Act, or being present therein for the purpose of gaming, to order all the instruments of gaming found therein to be destroyed, and also

to order all or any of the securities for money, or other articles seized, not being instruments of gaming, to be sold and converted into money, and the proceeds thereof with all monies seized to be forfeited, or, in his discretion, to order any part thereof to be returned to the persons entitled to the same.

The section is somewhat widely worded, but I cannot read it as laying down that, in the case of a conviction as specified, all money or other articles seized by the Police may be confiscated by the Magistrate, or in other words that the order of confiscation may be passed as regards the property of a person who is sent us for trial; but is found to have been innocently present at the common gaming-house, and is acquitted on that ground. A penal statute must be construed with reasonable strictness according to the true intent of the legislature, so that "no cases shall be held to fall within it, which do not "fall both within the reasonable meaning of its terms and "within the spirit and scope of the enactment." *Maxwell Interpretation of Statutes*, 3rd Edition, 369; *Hardcastle*, 2nd Edition, 479. The words "on conviction" are evidently intended to confer jurisdiction to order forfeiture only in cases where there is a conviction, and clearly mean that it cannot be exercised where there is no conviction. They have the effect therefore of limiting the jurisdiction to such cases, and it would be repugnant to their scope to hold that, where there is a conviction, the power to order forfeiture is unlimited. In the absence of express words to this effect, such an interpretation cannot be accepted. The power is thus necessarily restricted to property belonging to convicted persons.

The petitioner was acquitted by the Magistrate, and he must, for the purposes of the section, be assumed to have been innocently present at the gaming-house. Strictly speaking, he ought to have got a certificate indemnifying him against all prosecution for anything done by him in respect of the gaming for which he was arrested, but I think this would have included an indemnity against his property being forfeited, which is one of the penalties imposed by the Gambling Act against those who infringe its provisions.

The Magistrate probably omitted to pass an order respecting the petitioner's property owing to an oversight.

I accept the application and order the petitioner's property or its equivalent, if it has been sold, to be restored to him.

Application allowed.

No. 6.

Before Mr. Justice Reid and Mr. Justice Clark.

MOULA BAKHSH,—(ACCUSED),—PETITIONER,

Versus

QUEEN-EMPRESS,—RESPONDENT.

} REVISION SIDE.

Case No. 319 of 1898.

Criminal appeal—Duty of Appellate Court to consider facts of case—Doubts entertained by Appellate Court.

Though in criminal cases an Appellate Court should be guided in its estimate of the evidence of a witness by remarks recorded by the first Court, under Section 363, Criminal Procedure Code, as to the demeanour of that witness, such Appellate Court is bound to independently consider the facts of the case, and the prisoner is entitled to the benefit of reasonable doubt in the appellate no less than in the first Court.

Where, therefore, the Sessions Judge admitted that he was “perplexed” by the difficulties and incongruities of the case,” but upheld the conviction on the ground that an Appellate Court should not interfere with the finding of the first Court unless clearly convinced that it was erroneous, *held*, that the judgment of the Sessions Judge must be set aside, and the appeal heard *de novo*.

The Chief Court, therefore, transferred the appeal, under Section 526 of the Criminal Procedure Code, to itself for trial, and, after hearing counsel on the facts, reversed the conviction of the accused.

Petition for revision of the order of G. L. Smith, Esquire, Sessions Judge, Rawalpindi Division, dated 1st February 1898.

Muhammad Shah Din, for petitioner.

Robinson, Junior Government Advocate, for respondent.

The judgment of the Court was delivered by

REID, J.—This case and Criminal Revision 401 of 1898 *7th May 1898.* involve the same points, and will be disposed of together.

For the petitioners it is contended that the learned Sessions Judge has declined to decide the case himself, and has simply accepted the finding of the convicting Magistrate.

After setting out seven of “the most remarkable im-
“probabilities” in the case for the prosecution, and three
“improbabilities” in the case for the defence, the learned
Judge continues “I do not propose to discuss these difficulties
“in detail. It would serve no good purpose. Some explana-
“tion might no doubt be found to minimise some of them, but
“it is obvious that at the best they must still remain a
“formidable array. It is difficult to choose between the two
“sets, as to which is the least insurmountable, but I think

“that, for choice, those militating against the case for the prosecution are the least so.”

“Another reason, and the chief one, for my deciding in favour of the prosecution, is that the Magistrate, who tried the case, (and who is the best Judge of value of the evidence) decided against the accused, and this Court should not interfere with its finding, unless this Court is clearly convinced that the Magistrate’s finding is erroneous, which this Court (however perplexed by the difficulties and incongruities of the case) certainly is not (*I. L. R.*, V *All.*, 386). This course is the more proper in the present case, because the Magistrate was particularly influenced in his decision by the demeanour of the complainant and other witnesses, and the Magistrate was, of course, the best or rather the only Judge of that.”

“The appeals are dismissed.”

The rule laid down in *Empress v. Sajiwan Lal*, *I. L. R.*, V *All.*, 386, relied on by the learned Judge runs thus, “An appellant is not precisely in the same position, before an Appellate Court, as he is before the Court trying him, but must satisfy the Court that there is sufficient ground for interfering with the order of conviction, and, if no sufficient ground is shown, it is the duty of the Appellate Court not to interfere.”

If this means that a Court of Criminal Appeal is not to weigh the evidence on the record for itself, and form its own conclusions thereon, it is obviously wrong.

The Appellate Court should doubtless be guided in its estimate of the evidence of a witness by remarks recorded by the first Court under Section 363 of the Code of Criminal Procedure, as to the demeanour of that witness inasmuch as those remarks form part of the evidence on the record, and arguments used by the first Court frequently assist in dispelling doubts which the Appellate Court may entertain, on first considering the evidence, but there is ample authority for holding that the prisoner is entitled to the benefit of reasonable doubt in the Appellate Court as in the original Court, and as remarked by Mitter, J., in *Queen v. Goomanes and others*, XVII, *W. R.* (Criminal) 59, “the Appellate Court must weigh the evidence extrinsically as well as intrinsically.” In *Kheraj Mullah v. Janab Mullah*, XX *W. R.* (Criminal) 13, Kemp and Phear, JJ., say : “On reading the Sessions Judge’s judgment

“ it seems pretty clear that he was unable, even with the aid
“ of the Magistrate's finding of fact to form an independent
“ judgment as to whether the prisoners had committed the
“ offence or not. That being so, it was his duty to have
“ acquitted them.”

In *Protab Chundar Mukerji v. Empress*, XI, O. L. R., 25, White, J., says: “ The sound rule to apply in trying a criminal
“ appeal, where questions of disputed fact are in issue, is to
“ consider whether the conviction is right, and in this respect
“ a criminal appeal differs from a civil one. There the Court
“ must be convinced before reversing a finding of fact by a
“ lower Court that the finding is wrong.”

The same rule is laid down by a Division Bench in *Milan Khan v. Saghai Bepari*, I. L. R., XXIII Cal., 347, where the lower Appellate Court had said: “ I am not quite sure whether I should have arrived at the same conclusion, but
“ nothing has been urged before me which justifies me in
“ upsetting the finding on the question of fact.”

Their Lordships say: “ If the Judge of the Appellate Court
“ had any doubt that the conviction was a right one, and
“ had any doubt as to whether the offence charged had been
“ committed, whatever the original Court did, he should have
“ discharged the accused.”

In *Punjab Record* (Criminal), 1876, the rule is laid down that the law of appeal constitutes the Appellate Court Judge of the facts, just as completely as the Court of first instance.

This being the law, as we understand it, we have no doubt that the learned Sessions Judge should have given the petitioners the benefit of the doubt, which he obviously entertained, and should have acquitted them.

It is further contended by the learned counsel for the petitioners that the only course open to us, sitting as a Court of Revision, is to do what the lower Appellate Court should have done, and acquit the petitioners. To adopt this course would be to adopt the doubt entertained by the lower Appellate Court, although we might possibly entertain no such doubt ourselves. As a Court of Revision we can do anything which an Appellate Court might do, under Sections 423 and 428 of the Code of Criminal Procedure, including ordering a re-trial or ordering additional evidence to be taken. It is true that, in the four cases last quoted, the Courts do not appear to have considered the evidence on the record, as Courts of

appeal, but in *XXIII Cal.*, their Lordships say, before acquitting the petitioner: "We think that no possible gain can be derived by sending the case back. The Magistrate has expressed his own doubt as to whether the evidence is sufficient for a conviction. . . . That this is not really a case where public justice requires any further proceedings, adds to our reasons for not directing a re-trial." To adopt doubts entertained by a lower Appellate Court would, in our opinion, not infrequently cause a miscarriage of justice. The question now raised does not appear to have been raised in the cases quoted, and we hold that the judgment of the learned Sessions Judge must be set aside and that the appeal must be tried *de novo*.

Under Section 526 of the Code we have power to transfer an appeal to this Court for trial, and as it was, in our opinion, expedient that the appeal from the conviction by the Court of first instance should be tried by us, we have heard counsel on the facts. The conclusion at which we have arrived is that the improbabilities in the case for the prosecution, specified in the appellate judgment, exist, and have not been satisfactorily explained.

They raise such serious doubts as to the correctness of the conviction that we cannot maintain it.

It is quite possible that the complainant was cheated by some or all of the petitioners, but we cannot accept his evidence and the evidence of his witnesses as disclosing the facts.

One or two of the improbabilities specified might have been explained, but the concurrence of so many raises an insurmountable obstacle to our accepting the story for the prosecution.

The conduct attributed to himself by the complainant is almost incredible in a man of business, and the terms of the bond and the evidence of its marginal witnesses flatly contradict him.

We set aside the conviction and sentences and order the fines, if realized, to be refunded.

No. 7.*Before Mr. Justice Frizelle, Chief Judge.*

QADU,—(ACCUSED),—APPELLANT,

Versus

QUEEN-EMPRESS,—RESPONDENT.

} APPELLATE SIDE.

Case No. 232 of 1898.

Practice—Refusal of District Magistrate to summon witnesses for defence without expenses being paid by accused.

An order by a District Magistrate refusing to summon witnesses for the defence without their expenses being paid by the accused, although legal, should be passed very sparingly, and is an improper order in a case where the accused is unable or unwilling to deposit the money, and the result is that he is convicted without his witnesses being heard, especially if the case is one in which a severe sentence is inflicted.

Appeal from the order of J. G. M. Rennie, Esquire, District Magistrate, Mooltan District, dated 25th October 1897.

The judgment of the learned Chief Judge was as follows :

FRIZELLE, C. J.—This is the second case that has come before me within the last two days in which the District Magistrate of Mooltan has refused to summon witnesses for the defence without their expenses being paid by the accused. In the previous case I ordered the witnesses to be summoned at the expense of Government, and will pass the same order in this case. Although the order of the District Magistrate was legal, it is an order that should be passed very sparingly. It may be a proper order in a case in which the accused does not refuse to deposit the expenses and the witnesses are accordingly summoned and their evidence taken, but not in a case in which he may be unable or unwilling to deposit the money, and the result is that he is convicted without his witnesses being heard, especially if the case is one in which a severe sentence is inflicted, as in the present case (an aggregate sentence of 9 years' rigorous imprisonment). I now direct that the District Magistrate take the evidence of appellant's witnesses and forward it to this Court.

13th June 1898.

No. 8.*Before Mr. Justice Reid.*

SOJAN SINGH AND OTHERS,—(ACCUSED),—

PETITIONERS,

Versus

FAUJDAR SINGH AND OTHERS,—RESPONDENTS.

} REVISION SIDE.

Case No. 1056 of 1898.

Penal Code, Section 194—Sanction for prosecution.

Where an application is made for sanction for prosecution for an offence punishable under Section 194 of the Penal Code, either the

application or the sanction should indicate to the person to be prosecuted what story or statement is alleged to be false.

Petition for revision of the order of H. Scott Smith, Esquire, Additional Sessions Judge, Ferozepore Division, dated 16th April 1898.

The judgment of the learned Judge in Chambers was as follows :—

6th July 1898. REID, J.—The sanction for prosecution for an offence punishable under Section 194 of the Penal Code is far too vague, and this defect is not remedied by the application for sanction, which contains no particulars of the assignments of perjury.

Either the application or sanction should indicate to the person to be prosecuted what story or statement is alleged to be false.

This is clearly laid down by Straight, J., in *Har Dial*, I. L. R., VI All., 105, by Edge, C. J., in *Balwant Singh v. Umed Singh*, I. L. R., XVIII All., 203, and by Jardine, J., in *Jiwan Das*, I. L. R., XIX Bom., 362. The last named Judge said : “ In the present case the sanction relates to the giving of false evidence in a long deposition, but not the very slightest indication is given in the proceedings as to what story or statement was, in the opinion of the Sessions Judge, false.”

Edge, C. J., ruled that the assignments of perjury, for which sanction to prosecute was asked, should be distinctly stated in the application, and that it should not be left to the Court which is asked to grant the sanction, or to the Court which is to act on that sanction, to find out from another record, in a case of alleged forgery, what the document is in respect of which sanction is sought or required. I set aside the order granting sanction. The applicants for sanction can, if so advised, move the Court of Session by an application drawn up in due form.

Application allowed.

No. 9.

Before Mr. Justice Stogdon and Mr. Justice Chatterji.

QUEEN-EMPRESS,—APPELLANT,

Versus

ZAHARIA AND ANOTHER,—(ACCUSED),—
RESPONDENTS.

} APPELLATE SIDE.

Case No. 138 of 1898.

Indian Penal Code, Section 161—"Public servant"—Railway Act, 1890, Sections 3, 137—Railway servant at time of offence temporarily employed in service other than that of a Railway—Goods clerk.

A goods' clerk employed by a Railway Administration is a railway servant within the meaning of Section 3 (7) of the Railways Act, 1890, and under Section 137 of the said Act, is also a public servant for the purposes of Chapter IX of the Indian Penal Code.

Railway servants proper as long as they do not cease to be such continue to be "public servants" for the purposes of Chapter IX of the Indian Penal Code, whatever functions they may be temporarily discharging at the time when the offence by, or in respect of, them is committed.

A goods' clerk in the employment of a Railway Administration suspected certain frauds in the goods' office, and made a report to that effect to his superiors. The matter was subsequently taken up by the Police, and brought to the cognizance of the District Magistrate, who referred it to the Police for inquiry. The goods' clerk had meanwhile been deputed to assist the Police in the discovery and prosecution of the culprits, and while on such duty was approached by the accused, who offered him Rs. 500 if he closed the inquiry, and returned the books unchecked. The goods' clerk, who was throughout in communication with the Police, contrived to have the conversation over-heard by witnesses, and asked the accused to bring the money. They did so, and were arrested by the Police in the act of handing it over to the clerk. The District Magistrate convicted the accused under the second clause of Section 161 of the Penal Code, but they were acquitted on appeal by the Sessions Judge on the ground that at the time of the offence the clerk was employed to assist the Police in the inquiry, and was not, therefore, at that time a Railway servant, as defined in Section 3 (7) of the Railways Act, 1890, and, consequently, not a "public servant" for the purposes of Chapter IX of the Penal Code. On appeal by Government against the order of acquittal,

Held, that inasmuch as the goods' clerk had not at the time of the offence any official functions in the discharge of which he could have shown the favour in consideration of which the bribe was offered, the offence was not covered by the second clause of Section 161, Penal Code.

But *held*, that the offence fell under the third clause of Section 161.

The accused thought that the clerk alone possessed the technical knowledge necessary to bring home the suspected fraud to them from the records of the goods' office, and that if he represented to the Police

that there was nothing disclosed in the accuseds' books, on comparison with the Railway records, to prove anything against them, he would probably succeed in persuading the Police Inspector in charge of the inquiry, who was a public servant, acting as such, to make a report to that effect to the District Magistrate, and to get the case dismissed and the books returned.

Appeal from the order of S. Olifford, Esquire, Sessions Judge, Delhi, dated 30th October 1897.

Sinclair, Government Advocate, for appellant.

Madan Gopal, for respondent.

The judgment of the Court was delivered by

8th May 1898.

CHATTERJI, J.—The case for the prosecution is briefly as follows:—Mr. Harris was the chief goods' clerk of the East Indian Railway at the Delhi station. He suspected certain frauds in the goods' office, and made a report to that effect to his superiors. He was shortly after transferred to Tundla, where he made a further report, and was then deputed to assist in the discovery and prosecution of the culprits. The proceedings began with a report by Mr. Fitzpatrick, Inspector of Government Railway Police, at the instance of the District Traffic Superintendent, Tundla, on which cognizance was taken of the case by District Magistrate of Delhi, and the matter referred for inquiry to the Police. This was on 11th June 1897. On the same day Mr. Harris, accompanied by the Police, went to the shop of Chuni Ram-Ramdyal, where they seized the shop-books. The accused, Jogdhian, then made an offer to Mr. Harris to close the inquiry, and that very night definitely offered Rs. 500 for the same purpose and the return of the books. On the following morning the two accused repeated the offer in this way that Rs. 250 were to be paid down, and Rs. 250 on the return of the books unchecked. Mr. Harris, who was all along in communication with the Police, contrived to have witnesses to over-hear the conversation, and asked the accused to bring the money. They did so, and were arrested by the Police while in the act of handing it to Mr. Harris, and taken to the District Magistrate.

The above facts have been held to be proved by the District Magistrate, who convicted the accused under Sections 411, and sentenced them to three months' rigorous imprisonment and Rs. 100 fine each. He appears to hold that the accused intended that Mr. Harris should show them the favour they asked for in the discharge of his official functions as a Railway, and, therefore, as a public servant—a matter covered by the

second clause of Section 161 of the Indian Penal Code. He was of opinion that Mr. Harris in the discharge of his new functions continued to be such servant, though he was not doing his proper work. There was also a charge under Section 214 of the Indian Penal Code, but the District Magistrate acquitted the accused of it, and there is no appeal on that question.

On appeal the Sessions Judge held that Mr. Harris, while employed to help the police in the prosecution, or in the inquiry relating to the frauds in the goods' office, was not a Railway servant as defined in Section 3 (7) of the Railway Act, 1890, and was therefore not a public servant for purposes of Chapter IX of the Indian Penal Code. He, accordingly, reversed the conviction, and acquitted the accused. From this acquittal the present appeal has been lodged by the Crown.

In our opinion the District Magistrate appears to be wrong in thinking that the offence is covered by the second clause of Section 161, Indian Penal Code. As a matter of fact, Mr. Harris had at the time no official functions in the discharge of which he could have shown the favour, in consideration of which the bribe was offered. He might possibly have done so, had he continued in his original post, and the case had not gone to Court, by hushing up the inquiry, or by reporting to his superiors that the books of the Railway disclosed no fraud. But at the moment the bribe was offered, the inquiry was a criminal one in the hands of the Police by order of a Magistrate, and it was not possible for Mr. Harris to do the accused the required favour in the discharge of his official functions, and the accused cannot be assumed to have offered a bribe for an obviously impossible consideration. Mr. Harris was not authorized by law or by his superiors to drop the prosecution, or to return the books of the accused, if he thought proper. The whole matter was in the hands of the District Magistrate and the Police.

It appears to us, however, that the facts of the case, if established, are covered by the third clause of Section 161. The accused thought Mr. Harris alone possessed the technical knowledge necessary to bring home the suspected fraud to them from the records of the goods office of Delhi, and this appears to be practically the case. If he represented to the Police that there was nothing disclosed in the accused's books on comparison with the Railway records, to prove anything against them, he would probably succeed in persuading them

to make a report to that effect to the Magistrate under Section 202, Criminal Procedure Code, and to get the case dismissed and the books returned. This was the service which Mr. Harris could do to the accused, and the Police Inspector in charge of the inquiry was undoubtedly a public servant acting as such. The words of the clause appear clearly to admit of this construction, and to include a service of the nature mentioned above within its scope. *Queen v. Kallsechurn Serishtadar* 3, *W. R., Cr.*, 10, is a case in point. Illustration (c), which is probably meant to exemplify an offence falling under the clause, is not quite apposite to the present case, but it is of course not exhaustive.

The question, then, is whether Mr. Harris was a public servant while looking after the investigation. It is admitted by the Sessions Judge that he was a Railway servant within the meaning of Section 3 (7) of the Railway Act, as he is clearly employed by a Railway administration in connection with the service of a Railway. Clause (2) defines a Railway, which includes, para. (c), all offices, &c., constructed for purposes of, or in connection with, a Railway. A goods' clerk is clearly a Railway servant, and under Section 137 of the Act, Sub-Section (1), is a public servant also for purposes of Chapter IX of the Indian Penal Code. Assuming that the work on which Mr. Harris was employed at the time the bribe was offered to him was not employment in connection with the service of a Railway, did he on that account cease to be a Railway servant or a public servant? The offence may be committed by, or in respect of, one who is not even a public servant, viz., one expecting to be such. The section does not appear to contemplate that at the time of the bribe-taking the accused person should be actually discharging functions which constitute him a public servant. It is sufficient if he is a public servant, and his act falls under one of the three classes specified in the section. If it were otherwise, the Munsif in illustration (a) might escape with impunity if he happened to be on leave when he took the bribe. Mr. Harris had not severed his connection with the Railway, and he was still a goods' clerk, though at the moment he was temporarily deputed to do different work. We are of opinion that Railway servants proper, as long as they do not cease to be such, continue to be public servants for purposes of Chapter IX, Indian Penal Code, whatever functions they may be temporarily discharging at the time offence by, or in respect of, them is committed.

The learned Sessions Judge's view is based exclusively on the nature of Mr. Harris' service at the time the bribe was offered, and has no reference to the nature of the act he was expected to perform in consideration of it. We are of opinion that this view is erroneous. The acquittal must therefore be set aside.

The Sessions Judge has come to no finding on the evidence, as he held the prosecution to be legally unsustainable. We have gone through the record, and are of opinion that the facts found by the District Magistrate are established by the evidence. There is no reason to disbelieve the statements of the witnesses, and the fact that Rs. 250 were actually seized, and were produced in Court, affords the strongest corroboration of their testimony. It is impossible to believe that the case was concocted against the accused in this form. The plea of the accused Zaharia that Mr. Harris, in consequence of his imperfect acquaintance with Urdu, misunderstood the accused's overtures cannot be accepted. Such a misunderstanding was practically impossible, and the payment of the money is not rationally accounted for in the story told by the accused. There are two witnesses, *viz.*, Lachman Singh and Sayad-ud-din, to two of the interviews, and there is no possibility of their having misunderstood the character of the accused's offer. The denial of Jogdhian of all complicity in the offence is not worth consideration. We therefore restore the conviction.

As regards the sentence, the accused were two days in jail, and we consider it unnecessary to send them back to it. But the fine must be a substantial one, so as to be felt by the persons at whose instance the accused presumably committed the offence.

We accept the appeal, reverse the acquittal of the accused, and convict them under Sections 111, Indian Penal Code, and sentence them to two days' rigorous imprisonment (which they have already undergone), and Rs. 200 fine each, with three months' rigorous imprisonment in case of default of payment.

Appeal allowed.

No. 10.

Before Mr. Justice Frizelle, Chief Judge.

JAT SINGH,—(ACCUSED),—PETITIONER,

REVISION SIDE. {

Versus

QUEEN-EMPRESS,—RESPONDENT.

Case No. 1985 of 1898.

Excise Act, 1896, Section 51—Animals and conveyances liable to confiscation.

Accused was found with $1\frac{1}{2}$ seer of country liquor in his possession. He was carrying it in two bottles in his waistcoat pockets, and was riding on a mare at the time. He was convicted under Section 51 of the Excise Act, 1896, and sentenced to a fine of Rs. 20, and the mare on which he was riding was confiscated.

Held, that the order confiscating the mare, even if legal, was harsh and unnecessary, and must be set aside.

Semle: Animals and conveyances liable to confiscation under the Act are those on which illicit liquor is loaded, and an animal on which a man is merely riding with such liquor in his pockets does not come under that description.

Petition for revision of the order of C. M. King, Esquire, District Magistrate, Ferozepore, dated 7th September 1898.

The judgment of the learned Chief Judge was as follows:—

22nd Novr. 1898.

FRIZELLE, C. J.—Petitioner was found with $1\frac{1}{2}$ seer of country liquor in his possession. He was carrying it in two bottles in his waistcoat pockets, and was riding on a mare at the time. He has been convicted under Section 51 of the Excise Act, 1896, and sentenced to a fine of Rs. 20, and the mare on which he was riding has been confiscated.

The conviction and sentence of fine are quite right, but I do not think the confiscation of the mare was so. Animals and conveyances liable to confiscation under the Act seem to me to be those on which illicit liquor is loaded. An animal on which a man is merely riding with a couple of bottles of liquor in his pockets hardly seems to me to come under this description. Even if the order was legal, I consider it a harsh and unnecessary one.

I cancel this portion of the order and direct that the mare be restored to the petitioner. The conviction and sentence of fine will stand.

No. 11.

Before Mr. Justice Reid and Mr. Justice Anderson.

QUEEN-EMPRESS

Versus

CHETU AND OTHERS,—(ACCUSED).

} REFERENCE SIDE.

Case No. 59 of 1898.

Act XIII of 1859—Criminal Procedure Code, 1898, Sections 5, 83—Execution of warrants issued under Act XIII of 1859.

There is nothing in Section 5, read with Section 83 of the Criminal Procedure Code, 1898, which excludes from the operation of the latter section warrants issued under Act XIII of 1859.

Held, therefore, that a Magistrate has no discretion to decline to execute warrants issued by a Magistrate of another district under Section 1 of Act XIII of 1859 and forwarded to him for execution under Section 83 of the Criminal Procedure Code against persons resident in his district.

Case referred by Diwan Narendru Nath, District Magistrate, Gujranwala, by order, dated 26th September 1898.

Sinclair, Government Advocate, for Crown.

The judgment of the Court was delivered by

REID, J.—This is a reference under Section 438 of the Code of Criminal Procedure by the District Magistrate of Gujranwala. 9th Decr. 1898.

The question for consideration is whether a Magistrate has discretion to decline to execute warrants issued by a Magistrate of another district, under Section 1, Act XIII of 1859, and forwarded to him for execution under Section 83 of the Code of Criminal Procedure against persons resident in his district.

Subsequently to the publication of the Circular of the Government of India in 1896 on this subject it has been twice considered by a Division Bench of the Madras Court, *Queen-Empress v. Kattayan, I. L. R., XX Mad., 235*, and *Queen-Empress v. Muthaya, I. L. R., XX Mad., 457*, and once by a Division Bench of this Court in Criminal Revision No. 9 of 1897 (unpublished). The question referred in the last-named case was whether a Magistrate to whom a complaint is made under the Act should refuse to issue a summons or warrant for execution at a distance and refer the complainant to a civil suit, but the *ratio decidendi* is in point. The above judgments were delivered before the amendments of Section 5 of the Code by Act V of 1898, and that amendment strengthens the arguments in favour of the conclusions arrived at in them. Reading Section 5 and Section

83 together we can find nothing excluding from the operation of the latter section warrants issued under Act XIII of 1859.

The object of that Act was to supply a remedy where the remedy by suit in a Civil Court is inadequate, and to subject to punishment persons guilty of fraudulent breaches of contract described therein, and we see no reason to differ from the conclusions arrived at in the judgments referred to that the provisions of the Code refer to a warrant issued under the Act.

A Magistrate to whom a warrant is forwarded under Section 83 of the Code has no discretion except as to the amount of bail and similar details, and must execute it as directed.

Such discretion as there is in the matter is vested in the Magistrate to whom a complaint under the Act is made, and is to be exercised in the manner applicable to complaints under the Code.

The record will be returned to the Magistrate of the district with these remarks.

No. 12.

Before Mr. Justice Frizelle, Chief Judge.

LAJJE RAM AND OTHERS,—(ACCUSED),—PETITIONERS,

Versus

QUEEN-EMPRESS,—RESPONDENT.

} REVISION SIDE.

Case No. 2138 of 1898.

Penal Code, Sections 451, 456, 509—Intention to commit offence—Rescue from illegal arrest.

In a case where it was proved that the accused was found at night inside complainant's house where he had gone for the purpose of visiting the latter's widowed daughter-in-law, a woman of loose character, with whose knowledge and consent he had in all probability entered the room,

Held, by the Chief Court, on the revision side, that accused had been wrongly convicted under Section 456 of the Penal Code, as he had none of the intentions necessary to constitute the offence described in Section 451 of the Code and could hardly have had the intention of committing the offence described in Section 509.

Held, therefore, that inasmuch as the apprehension of accused was illegal under Section 59 of the Criminal Procedure Code, his conviction under Section 224 and that of his brothers under Section 225 of the Penal Code must be set aside.

Petition for revision of the order of S. Clifford, Esquire, Sessions Judge, Delhi Division, dated 10th October 1898.

Madan Gopal, for petitioners.

The judgment of the learned Chief Judge was as follows :—

FRIZELLE, C. J.—The petitioner, Lajje Ram, was found and looked up inside a room, visiting a widow daughter-in-law of the complainant. His brothers, the other two petitioners, came to his rescue and forcibly released him, and all three have been convicted, Lajje Ram under Sections 456 and 224, and the others under Section 225, Indian Penal Code. I do not think any of the convictions can stand, as Lajje Ram was not guilty of criminal trespass and his apprehension was, therefore, illegal under Section 59, Criminal Procedure Code. He had none of the intentions necessary to constitute the offence described in Section 451, Indian Penal Code. His intention is admitted by the Sessions Judge to have been to visit or have intercourse with one of the daughters-in-law of complainant, both of whom are widows. The evidence shows that the one he was found with was Mussammatt Ganga Devi, and also that she is a woman of loose character. That she is so is proved not only by the evidence in this case but by a report made by complainant in the Thana in 1896 that she was pregnant and that he was

29th Novr. 1898.

afraid she would procure an abortion. Lajje Ram therefore could hardly have had the intention of committing the offence described in Section 509, Indian Penal Code (insulting the modesty of a woman). There is every reason to suppose that he entered the room with her knowledge and consent, and that her modesty would not be insulted by anything he intended to do. This makes the case different from those reported in *I. L. R., XVI Calc.*, 657, and *XXII Calc.*, 391 and 994, on which the Sessions Judge relies in supporting the convictions.

I reverse the finding and sentences and acquit the petitioners. The fines, if realized, will be refunded, and Lajje Ram will be discharged from his bail.

No. 13.

Before Mr. Justice Reid and Mr. Justice Anderson.

GHASI,—(ACCUSED),—PETITIONER,

Versus

QUEEN-EMPRESS,—RESPONDENT.

Case No. 2170 of 1898.

*Criminal Procedure Code, 1898, Sections 190 (1) (c), 191, 534—
Omission to comply with requirements of Section 191 of the Code.*

The Magistrate having taken cognizance of an offence under clause (c) of sub-section (1) of Section 190 of the Criminal Procedure Code, 1898, proceeded to try the case himself, and before commencing to record evidence omitted to inform the accused that he was entitled to have the case tried by another Court as prescribed by Section 191 of the Code. The accused having been convicted appealed to the Sessions Judge, and made it one of the grounds of his appeal that the omission to comply with the terms of Section 191 invalidated the trial. The Sessions Judge, however, overruled this contention, relying on the analogy of Section 534 of the Code.

Held, that inasmuch as the Magistrate had interested himself very considerably in instituting the prosecution and as his mind could not under the circumstances have been completely free from bias, it was incumbent on him to comply with the terms of Section 191 and to afford the accused an opportunity of making his election.

The Court accordingly set aside the conviction and ordered a new trial before another Magistrate.

Petition for revision of the order of S. Clifford, Esquire, Sessions Judge, Delhi Division, dated 30th October 1898.

Browne, for petitioner.

The judgment of the Court was delivered by

20th Decr. 1898.

ANDERSON, J.—In this case the Magistrate (Mr. Warburton) himself instituted a prosecution for theft against the appellant

Ghasi upon information received from some person other than a police officer as contemplated by clause (c), sub-section (1) of Section 190 of the Criminal Procedure Code. He proceeded to try the case himself and before commencing to record evidence omitted to inform the accused that he was entitled to have the case tried by another Court as prescribed by Section 191 of Act V of 1898.

The trial resulted in the conviction of Ghasi, who appealed to the Sessions Judge and made it one of his grounds that this formality having been neglected the trial had been invalidated.

The learned Sessions Judge had some doubts as to whether he should not have ordered a re-trial, but decided that the omission did not invalidate the trial. In reaching this decision he was influenced by what he terms "the analogy of Section 534, Criminal Procedure Code," but there is no such provision entered in the Code with regard to an omission under Section 191 as appears in Section 534 in respect of an omission to carry out the prescribed procedure of Section 454.

Section 191 of Act V of 1898 is in modification of the same section in Act X of 1882 as amended by Act III of 1884, and it is now made clear that the accused shall be informed of his right to be tried by another Court, and that an opportunity must be given him of making his choice before any evidence is taken. We are not prepared to hold that the omission to inform the accused must always fall within the provisions of Section 537 of the Code, and, in the present case, we are clearly of opinion that it was incumbent on the Magistrate to have afforded to the accused an opportunity of making his choice. The Magistrate had interested himself very greatly in preparing the case, and with the best intention possible his mind could hardly have been free from all bias. The opening pages of his judgment show that he had been privately hearing unfavourable reports of the Thanadar who had sent up a case against Harnam and had not proceeded against Ghasi, and it was because he believed that the Thanadar had misconducted himself that he took up the inquiry so zealously.

We are not thoroughly satisfied that the Magistrate was completely free from bias, and, although he has taken great pains with the case, we think the appellant has been to some extent prejudiced by his action, and it is therefore all the more necessary to pay attention to the requirements of Section 191. *I. L. R., XX Cal.*, 857, is a case somewhat resembling the present, in which it was held that a Magistrate who had taken

part in collecting evidence himself was disqualified from trying the case.

For the reasons given above we set aside the conviction and direct a new trial before another Magistrate.

Application allowed.

No. 14.

Before Mr. Justice Frizelle, Chief Judge, and Mr. Justice Reid.

KARAM DIN AND OTHERS,—(ACCUSED),—PETITIONERS,

Versus

QUEEN-EMPRESS,—RESPONDENT.

Case No. 1435 of 1898.

Criminal trial—Hearing fixed for specified date but subsequently accelerated—Accused's pleader unable to attend at hearing on altered date.

On the 16th May the trial of accused was fixed for the 26th May and petitioners' chief pleader was informed of the latter date, but on the 17th, the date of hearing was changed to the 18th. The said pleader was informed of the change by telegram, and in reply telegraphed to the effect that he could not appear on the 18th, and asked to have the hearing fixed for the 23rd. Contrary, however, to this request and the wishes of the accused's other pleaders, the trial was proceeded with on the 18th and continued till the 21st, when the case was decided and accused convicted.

Held, that the procedure of the Magistrate was improper and gave accused just cause for complaint. If there were any reasons for accelerating the date of hearing, the trial should not have been concluded and judgment pronounced without waiting until the date desired by accused's pleader or the date originally fixed, hearing the pleader and allowing him to recall any of the witnesses he wished.

The Chief Court, however, refused to order a re-trial of accused on the ground that the irregularity and impropriety of the procedure had not under the circumstances of this case occasioned any failure of justice.

Petition for revision of the order of Rai Bahadur Lala Buta Mal, Sessions Judge, Sialkot Division, dated 6th July 1898.

Lakhshmi Narain and K. P. Roy, for petitioners.

The judgment of the Court was delivered by

12th Augt. 1898.

FRIZELLE, C. J.—The main purport of this petition for revision is that a new trial should be ordered on the ground that the procedure of the Magistrate who tried the case was irregular and that petitioners were thereby seriously prejudiced. The irregularity complained of was this, that the trial was fixed on the 16th May 1898 for the 26th May 1898, and petitioners' chief pleader, Mr. K. P. Roy, informed of this date; that the date was on the 17th changed to the 18th, and Mr. Roy informed by telegram; that he replied by telegram saying that

he could not appear on the 18th and asking to have the 23rd fixed, but contrary to the wishes of petitioners' other pleaders the trial was proceeded with on the 18th and continued until the 21st, when the case was decided and petitioners convicted. We are of opinion that the procedure was improper and gave petitioners just cause for complaint. If there were any reasons for accelerating the date, such as that alleged for the prosecution, the trial should not have been concluded and judgment pronounced without waiting until the date, which was a near one, desired by petitioners' pleader or the date originally fixed, hearing the pleader, and allowing him to recall any of the witnesses he wished.

But the irregularity and impropriety of the procedure did not, we think, occasion any failure of justice, and a new trial ought not to be ordered. When the Magistrate decided to proceed with the case, petitioners' other pleaders offered apparently no further objection, as they might have done, by withdrawing from the case, applying for its transfer or declining to cross-examine the witnesses or produce witnesses for the defence. The evidence was fully gone into, the witnesses were cross-examined and witnesses for the defence heard. The learned pleader (Mr. K. P. Roy) has also had an opportunity of fully arguing the case on the merits in the appeal to the Sessions, and did so argue it. Objection is verbally taken to the fact that the Sessions Judge in his judgment wrongly referred to the previous case in which one Said Mir was complainant and which had not been decided when the Sessions Judge heard the appeal. We think there was nothing wrong in the Sessions Judge alluding to that case. He only mentions the fact of a complaint having been made and formed no opinion as to what the facts of that case were. The case quoted before us, *I. L. R., XXII Cal.*, 998, is therefore hardly analogous.

Indeed no objection is made in the petition for revision as to any such matter having been wrongly taken into consideration by the Sessions Judge. We therefore see no reason for going into the whole of the evidence, and no ground is shown us for considering it likely that a wrong conclusion has been come to on the evidence. But we think good reason is shown us for modifying the punishments. The sentences are excessively severe, the case has evidently been a good deal exaggerated, and the injuries to the two men assaulted do not seem to us so severe as they have been represented. Still the case was one which requires a severe sentence, and we therefore only interfere

to the extent of reducing the sentences on each of the petitioners to one year's rigorous imprisonment with one month's solitary confinement.

We hope the Magistrate will abstain from such hasty and inconsiderate action as that we have commented upon in future.

Convictions upheld: sentences modified.

No. 15.

Before Mr. Justice Frizelle, Chief Judge, and Mr. Justice Reid.

QUEEN-EMPRESS,—APPELLANT,

APPELLATE SIDE. {

Versus

KHUSHAL SINGH AND OTHERS,—(ACCUSED),—
RESPONDENTS.

Case No. 166 of 1898.

Appeal by Government from order of acquittal—Appeals in petty cases.

Held, that appeals by Government from orders of acquittal should be made only in cases of some importance.

Appeal from the order of Sardar Gurdial Singh, Man, Sessions Judge, Sialkot Division, dated 16th November 1897.

Robinson, Junior Government Advocate, for appellant.

The judgment of the Court was delivered by

18th Novr. 1898.

FRIZELLE, C. J.—Rice and almonds, which complainant claimed as stolen from him, were admittedly found in Khushal Singh's possession. Khushal Singh did not allege that they were his own. He admitted that he received them from the other accused; and, although such articles are not usually identifiable, we are satisfied from this admission of Khushal Singh, from the articles being found with him immediately after the theft, and from other articles, the produce of the same theft, being given up by the other accused, that the rice and almonds found in Khushal Singh's house belonged to complainant and were stolen from him. We also have no doubt that Khushal Singh knew or had reason to believe the articles to be stolen if he did not take part with other accused in committing the actual theft. He received the things under suspicious circumstances from persons well known to be bad characters at an early hour of the morning when he must have suspected that they were returning from a thieving expedition, and when they were most probably laden with the other plunder. We think, therefore, that he ought not to have been acquitted by the Sessions Judge, but his conviction by the Magistrate should have been rather under

Section 411, Indian Penal Code, than Section 457. The prosecution itself offered evidence to show that he only received the rice and almonds from the other accused.

As to these other accused—Ali Manna, Khairu and Ram Singh—we find it proved that they pointed out a place on the bank of a *nullah*, where two tins of *ghi* and a broken *chati* of *ghi* were found buried in the ground. They did so immediately after Khushal Singh had given information against them. As these articles were in the list of stolen property reported by complainant before the discovery was made, as they were discovered very soon after the theft, on Khushal Singh's giving up the names of the thieves, and as there was nothing unlikely in complainant being able to identify the tins, we have no doubt that these also were stolen. We see no reason to reject the evidence that these accused pointed out the place where the articles were found. They could not have done so without having committed the theft. Evidence of this kind is often made up, but we think it impossible that it could have been made up in this case. Even the Sessions Judge, although he acquitted the accused, did not disbelieve the evidence as to the manner in which the *ghi* was found, and only acquitted them because he doubted the evidence of identification as to which we disagree with him.

We, therefore, accept the appeal and convict all the accused. Khushal Singh under Section 411, and Ali Manna, Khairu and Ram Singh under Section 457, Indian Penal Code. Only a moderate sentence is necessary. None of the accused has ever previously been convicted, the theft was of a petty nature, the value of the stolen property being only Rs. 22 or Rs. 23 altogether, and three of the accused have been already a considerable time in confinement. We may remark that the case was hardly one worth appealing. Appeals by Government should, we think, only be made in cases of some importance.

We sentence Khushal Singh to six months' and Ali Manna, Khairu and Ram Singh to nine months' rigorous imprisonment, with one month's solitary confinement each. Sentence to take effect from date of imprisonment in pursuance of this order, and District Magistrate should take the necessary measures for Khushal Singh's arrest.

Appeal allowed.

No. 16.

Before Mr. Justice Clark, Chief Judge.

BURE KHAN,—(ACCUSED),—PETITIONER,

Versus

QUEEN-EMPRESS,—RESPONDENT.

Case No. 2416 of 1898.

Criminal Procedure Code, 1898, Section 195 (7)—Sanction for prosecution—Subordination of Courts.

For the purposes of Section 195, Criminal Procedure Code, 1898, the Court of the District Judge is the Court to which a Munsif is subordinate, and it is the Court of the District Judge and not of the Divisional Judge which can give sanction for prosecution in respect of offences referred to in the said section when committed in the Court of a Munsif.

Petition for revision of the order of G. Lewis, Esquire, Divisional Judge, Amritsar Division, dated 20th August 1898.

Jaishi Ram, for petitioner.

The judgment of the learned Chief Judge in Chambers was as follows :—

25th Jany. 1899.

CLARK, C. J.—Under Section 195, Criminal Procedure Code, the Divisional Judge has given sanction for the prosecution of Bure Khan under Sections 193, 196, 465 and 471, Indian Penal Code; these offences having been committed before Lala Amolak Ram, Munsif, Gurdaspur, who has left the district.

The law has been changed in the new Criminal Procedure Code, and Section 195 (7) lays down that—

“For the purposes of this section every Court shall be deemed to be subordinate only to the Court to which appeals from the former Court ordinarily lie, that is to say, (a) where such appeals lie to more than one Court, the appellate Court of inferior jurisdiction shall be the Court to which such Court shall be deemed to be subordinate.”

For the purposes of this section the Court of the District Judge is the Court to which the Munsif is subordinate, and it is the Court of the District Judge, not of the Divisional Judge, which can give sanction for offences referred to in Section 195, Criminal Procedure Code, committed in the Court of a Munsif.

The sanction of the Divisional Judge is set aside as without jurisdiction.

Full Bench.**No. 17.**

*Before Mr. Justice Clark, Chief Judge, Mr. Justice Reid, Mr.
Justice Chatterji, and Mr. Justice Anderson.*

QUEEN-EMPRESS,*Versus***SAIF ALI,—(ACCUSED).**

Case No. 1075 of 1898.

} APPELLATE SIDE.

Criminal Procedure Code, 1898, Section 545—Culpable homicide—Power of Court to grant compensation—Act XIII of 1855—"Injury"—Penal Code, Section 44—Enhancement of sentence.

Held, by the Full Bench, that it is competent to a Court, under Section 545 of the Criminal Procedure Code, 1898, to award part of the fine imposed under Section 304 of the Penal Code for the offence of culpable homicide not amounting to murder to the widow of the person killed, in compensation for the injury caused by the offence committed, the loss of her husband's support affecting a widow prejudicially in a legal right, and being therefore "an injury" as defined in Section 44 of the Penal Code, for which substantial compensation can be awarded by a Civil Court (I. L. R., XII Mad., 352, and I. L. R., XXI Mad., 74 (F. B.), not followed).

Where the accused, enraged by vile abuse addressed to him by the deceased, struck the latter a severe blow on the head with the first thing that came to hand, viz., a wooden lamp-stand, which blow fractured the skull and caused death not long afterwards, *held*, by the Division Bench that a sentence of two years' rigorous imprisonment, including two months' solitary confinement and a fine of Rs. 100, or, in default, six months' further rigorous imprisonment, passed by the District Magistrate was, under the circumstances of the case, not inadequate, and should not be enhanced.

Per Chatterji J. (in Chambers).—An enhancement of sentence should take place only when the sentence awarded is manifestly inadequate, and the powers of the Chief Court for such purpose should be exercised only under exceptional circumstances.

*Case reported by G. Leslie Smith, Esquire, Sessions Judge,
Rawalpindi Division.*

The facts of this case were as follows :—

Saif Ali, accused, lived in a small hamlet belonging to Deryala Khaki, in which there were only two dwelling-houses, Saif Ali's and his uncle Dadu's.

On the day of the occurrence of the offence, Saif Ali's lamb was seen trespassing on the crop, and Daraz remonstrated with him about it. An altercation ensued, and Daraz went to the door of Saif Ali's house, inside which Saif Ali had gone, and continued to abuse him. Saif Ali raised a wooden lamp-stand

which was standing just inside the door and hit Daraz with it one blow on the forehead which smashed his skull and felled him, and from the consequences of which he died five days after.

The accused was convicted and sentenced by the District Magistrate as follows :—

The accused, on conviction by J. Wilson, Esquire, exercising the powers of a District Magistrate in the Rawalpindi District, was sentenced, by order dated 7th April 1898, under Section 304, Part II of the Indian Penal Code, to two (2) years' rigorous imprisonment, including two months' solitary confinement and to pay Rs. 100 fine, or, in default, six months' further rigorous imprisonment.

The proceedings were forwarded by the learned Sessions Judge for revision on the following grounds :—

“ On the facts found (and I think rightly found) by the District Magistrate, I am of opinion that the sentence awarded was inadequate. A very severe blow was given on the head with a very formidable weapon, which blow fractured the skull and caused death not long afterwards. The case is very much on all-fours with that reported in No. 5, *Punjab Record*, Criminal, 1893, and in that case a sentence of five years was passed by the Chief Court. A similar sentence appears to be called for here.

“ The proceedings of the case are therefore submitted to the Chief Court, Punjab, on the Criminal Revision Side under Section 438, Criminal Procedure Code, with a view to enhancement of sentence.”

The case in the first instance came before Mr. Justice Chatterji, in Chambers, who passed the following order :—

16th June 1898.

CHATTERJI, J.—I have gone through the record and do not on the whole see sufficient grounds for enhancing the sentence. The accused hit a single blow, and there is no question that he had any intention of causing death or bodily injury likely or sufficient in the ordinary course of nature to cause death. It has been found that he knew that he was likely to cause death, and this is probably right, though if the Court had been a little more indulgent it might have found that the accused knew nothing more than that he was likely to cause grievous hurt. See *Punjab Record*, No. 18 of 1893, Cr., which partially exemplifies this remark. Altogether the act was the result of a momentary impulse and the consequences were probably due as much to

misfortune as to any conscious effort on the accused's part. An experienced and careful Magistrate has, in view of all the circumstances, considered a sentence of two years sufficient to meet the ends of justice, and I am not prepared to say that he is egregiously wrong. An enhancement should take place only when the sentence is manifestly inadequate, and the powers of this Court for this purpose should be exercised only under exceptional circumstances. Possibly a slightly heavier sentence might have been better suited to the case, but I doubt whether it was necessary to inflict one of five years' rigorous imprisonment. In No. 5, *Punjab Record*, 1893, the facts were more adverse to the accused. But even if the Sessions Judge's opinion is right, it is not necessarily a good reason for enhancement. See No. 7, *Punjab Record*, 1889.

I accordingly decline to act on the Sessions Judge's recommendation. But with reference to the order for compensation I should like to be informed by the District Magistrate who the heirs of the deceased are in whose favour it has been passed. Compensation can only be awarded where substantial compensation can be recovered by civil suit. Act XIII of 1855 lays down the law on the subject, and the heirs must be such as can claim compensation under Section I of that Act.

On the receipt of the District Magistrate's reply this part of the case will be disposed of.

On receipt of the return of the District Magistrate the case was referred to the Division Bench by the following order of the learned Judge in Chambers :—

CHATTERJI, J.—The return of the District Magistrate is that *12th Augt. 1898.* the deceased has left a son, Jiwan, and a widow, Mussammat Sardaro, who are his heirs.

Under Section 1, Act XIII of 1855, these persons would be entitled to maintain a civil suit for damages or compensation for the injury to the deceased if the defendant's act, neglect or default which caused the death was such as would have entitled the deceased to maintain an action of this nature had he not died. The District Magistrate's order for compensation is correct if substantial compensation is recoverable by civil suit by these heirs for the injury which caused Daraz's death.

But *Punjab Record*, No. 6, of 1890, Criminal, is against this view, so also in *re Luchmaka* (*I. L. R.*, XII Mad., 352).

I have some doubt as to the correctness of these rulings, but a very recent Full Bench Judgment of the Madras Court,

Yala Gangulu v. Moundi Dali (I. L. R., XXI Mad., 74) agrees with them. The earlier cases may be put out of consideration, as the previous Acts were differently worded. If the Full Bench Judgment and No. 6 of 1890, Criminal, are correct, the order of the District Magistrate must be set aside. I, however, think it best to refer the question to a Bench. If the District Magistrate's order is wrong and without authority, I think we should set it aside, as it causes substantial loss to Government which would otherwise be entitled to the fine.

The question of law involved was referred to a Full Bench by the following order of the Division Bench (*Reid and Anderson, JJ.*):—

17th Oct. 1898.

REID, J.—Having considered the evidence on the record, we concur with Mr. Justice Chatterji that the sentence passed by the District Magistrate is not inadequate: the prisoner was enraged by vile abuse addressed to him by the deceased, and struck only one blow with the first thing that came to hand, a wooden lump-stand. In No. 5, *Punjab Record*, Criminal, 1893, the prisoner killed his wife in the course of a quarrel, and deserved a more severe sentence than the prisoner before us, who struck a man who abused him. The question raised by Mr. Justice Chatterji, whether compensation can be awarded to the son and widow of the deceased under Section 545 of the Code of Criminal Procedure of 1882, reproduced *totidem verbis* in the Code now in force, raises considerable difficulty.

No. 6, *Punjab Record* (Cr.), 1890, is not in point, inasmuch as Act XIII of 1855 is an Act to provide compensation to families for loss occasioned by the death of a person caused by actionable wrong, and the persons fined in that case were convicted only under Section 323 of the Penal Code, and were held not to be responsible for the death of the deceased, who died of apoplexy. There can be no doubt of the correctness of the ruling quoted.

The question is whether the words in Section 545, "the Court may order the whole or any part of the fine recovered to be applied in compensation for the injury caused by the offence committed, where substantial compensation is, in the opinion of the Court, recoverable by civil suit," are limited as they have been held to be limited in *Yala Gangulu v. Moundi Dali*, I. L. R., XXI Mad. (F. B.), 74. The reference to the Full Bench was made because the correctness of the ruling in *re Lutchmaka* (I. L. R., XII Mad., 352) was doubted.

In both these cases death was caused by a rash or negligent act, the conviction being under Section 304-A of the Code.

In *XII Mad.*, no reasons are given and no authority is quoted. In *XXI Mad.*, compensation was held not to be awardable for reasons which appear to be open to doubt. Had the legislature intended to limit the compensation awarded under Section 545 (b) to the person against whom the offence was committed it would have been very easy to embody words of limitation in that clause. The reasons given in the referring order in *XXI Mad.* support the view that compensation is awardable to the widow or son.

As this view is opposed to that expressed by the Full Bench of the Madras Court, we refer to a Full Bench the question whether, under Section 545 of the Code of Criminal Procedure, compensation may in cases of culpable homicide be awarded to any person for whose benefit a suit would lie under Act XIII of 1855.

The judgment of the Full Bench was delivered by

REID, J. (*Clark, C. J., Chatterji and Anderson, JJ., concurring*). 29th Jan'y. 1899.]
 —The question for consideration is whether, under Section 545 of the Code of Criminal Procedure, part of the fine imposed under Section 304 of the Penal Code for the offence of culpable homicide not amounting to murder may be paid to the widow of the person killed, in compensation for the injury caused by the offence committed. It is unnecessary in this particular case to deal with the question of payment to other relations.

Under Act XIII of 1855, a suit may be maintained for the benefit of the widow against the person causing her husband's death, and the Court may give such damages as it may think proportioned to the loss resulting from the death to the widow, the object of the Act being to provide compensation to families for loss occasioned by the death of a person caused by actionable wrong.

Section 545 of the Code empowers a Court which passes a sentence of fine to order the whole or part of any fine recovered to be applied in compensation for the injury caused by the offence committed, where substantial compensation is, in the opinion of the Court, recoverable by civil suit.

There is no suggestion that the widow in this case could not recover substantial compensation under Act XIII.

The authority on the question is limited.

Under Section 44, Act XXV of 1861, which allowed compensation out of the fine imposed to be paid to, or for, the person who had suffered by an offence, not exceeding the loss appearing to be caused to him, the Calcutta Court, in *re*

Roop Lal Singh (X W. R., Cr., 39), held that, if compensation could be awarded to all the heirs of any person who had been killed it was impossible to say where such orders would stop, and that compensation could only be awarded to the actual sufferer, or the person directly injured by the offence.

Section 44 did not contain the words "where substantial compensation is, in the opinion of the Court, recoverable by civil suit," which obviate the difficulty pointed out by the Calcutta Court, arising from holding that compensation could be awarded to all heirs of the deceased, Act XIII limiting these heirs to the wife, parent, husband, or child.

Queen v. Moorat Loll (VI W. R., Cr., 93) is not in point, death not having been caused by the offender, nor is No. 6, *Punjab Record* (Cr.), 1890, the offenders therein being convicted only of causing simple hurt, and not being held responsible for the death of the person hurt, which was held to have resulted from apoplexy. *In re Lutchmaka* (I. L. R. XII Mad., 352), it was held that Section 545 of the Code did not contemplate an order for compensation, to be paid out of a fine imposed under Section 304-A, to the widow of the man whose death was caused by the rash or negligent act in question. No reasons were recorded for the decision. The same question arising in *Yala Gangulu v. Moundi Dali* (I. L. R., XXI Mad. (F.B.), 74) was referred to a Full Bench, because the correctness of the ruling in *XII Mad.* was doubted.

The Full Bench confirmed that ruling, holding that the Codes of 1872 and 1882 had made no change in the law contained in the Code of 1861, under which it was obvious that compensation could not have been awarded to the widow. Section 545 of the Code of 1882 is reproduced in the present Code, while the corresponding Section 308 of the Code of 1872 provided that part of the fine might be awarded to, or for, the benefit of the complainant, or the person injured, or both, in compensation for the offence complained of, where such offence could, in the opinion of the Court, be compensated by money.

With all deference to the opinion expressed by Sheppard, J., and concurred in by the rest of the Madras Full Bench, the change in the language of the Codes appears to me significant, whatever the true interpretation of Section 44 of the Code of 1861 may have been.

The omission of the words "the person who has suffered by such offence," which appeared in the Code of 1861, and of "the complainant, or the person injured, or both," which appeared

in that of 1872, from Section 545 of the Codes of 1882 and 1898, and the language of (1) (a) of that section lead me to the conclusion that compensation may now be awarded to the widow. It is true, as laid down in the Madras ruling, that "injury" in Section 545 must be interpreted, having regard to Section 4 (1) of the Code and Section 44 of the Penal Code, as defined in the latter section, i.e., harm illegally caused to any person in body, mind, reputation, or property, but I do not think that interpretation is opposed to my view of the law.

In the notes to the Penal Code by Sir W. Morgan, C.J., and A. C. Macpherson, J., it is said that an act which is by law wrongful as regards the person complaining, that is, which affects him prejudicially in some legal right, is an injury, and in my opinion the definition in Section 44 was intended to be as wide as possible.

It does not appear to me that the word "injury" in the preamble to Act XIII bears a wider interpretation than the same word used in Section 545 (1) (b), and the words in that sub-section, "where substantial compensation is recoverable by civil suit," appear to me to mean "if the circumstances are such that some person could recover substantial compensation by civil suit."

Act XIII is described, as already stated, as "an Act to provide compensation to families for loss occasioned by the death of a person caused by actionable wrong." It is a reproduction of Lord Campbell's Act, IX & X Victoria, Chapter 92, under which it has been ruled that the person for whose benefit the action is brought must have suffered some pecuniary loss by the death of the deceased, pecuniary loss meaning some substantial detriment in a worldly point of view, including loss of support and even loss of mere gratuitous liberality—*Franklin v. South Eastern Railway Company*, 3. Hurl and N., 211; *Pym v. G. N. Railway Company*, 4 B. and S., 396; *Hetherington v. North Eastern Railway Company*, 9, Q. B. D., 160; and *Dalton v. South Eastern Railway Company*, 27, L. J., C. P., 227. It was held in *Osborn v. Gillet*, L. R. 8, Ex. 88, that grief, mourning and funeral expenses could not be taken into account, but I think the authorities quoted above justify the conclusion that loss of her husband's support affects a widow prejudicially in a legal right, and is therefore an injury as defined in the Penal Code for which substantial compensation can be awarded by a Civil Court, the right of a woman to be supported by her husband being an existing right.

For these reasons I would answer the question referred in the affirmative.

The case was thereafter disposed of by the following order of the Division Bench:—

31st Jany. 1899.

REID, J.—In accordance with our view of the facts, recorded in our referring order of the 17th October 1898, and with the decision of the Full Bench, we maintain the order of the District Magistrate.

No. 18.

Before Mr. Justice Reid.

GOBIND RAM AND OTHERS,—(ACCUSED)—
PETITIONERS,

Versus

QUEEN-EMPRESS,—RESPONDENT.

Case No. 247 of 1899.

Sanction for prosecution—Penal Code, Section 193—False evidence—Inquiry under Act XXXVII of 1850—Repeal of Section 17 of Act XXXVII of 1850, effect of—Oaths' Act, 1873, Sections 4, 14—Validity of sanction.

Certain persons having given evidence before Commissioners appointed under Act XXXVII of 1850 to hold an inquiry into the behaviour of a certain Judicial Officer, the said Commissioners thereafter on the application of the Government Advocate, but without notice to the accused, granted sanction for their prosecution under Section 193 of the Penal Code. At the commencement of the trial before the District Magistrate, preliminary objections were taken as to the nature and validity of the sanction, but were overruled, whereupon accused applied to the Chief Court on the revision side, and it was contended, on their behalf, that the sanction should be set aside because, *inter alia*, (1) the repeal of Section 17 of Act XXXVII of 1850 by Act XII of 1876 showed that it was not intended that witnesses who gave false evidence before a Commission appointed under the first-mentioned Act should be punished therefor, and (2) the sanction was vague and indefinite, granted without notice to accused, and was not necessary for the ends of justice.

Held, that Section 17 of Act XXXVII of 1850 had been repealed merely because the provision therein contained had been rendered obsolete by the enactment of the Penal Code and the Oaths Act, 1873, and that inasmuch as the Commissioners were empowered under Act XXXVII of 1850 to receive and record evidence, they were authorised under Section 4 of the Oaths Act to administer oaths and affirmations in the exercise of the power so conferred on them.

Held, therefore, that under Section 14 of the Oaths Act, witnesses examined before the said Commissioners were bound to state the truth, and rendered themselves liable to be prosecuted under Section 193 of the Penal Code if they testified falsely.

REVISION SIDE. }

Held, further, that the sanction, read as it should be with the application for sanction, was sufficiently explicit; that under the circumstances of the case previous notice to the accused was unnecessary, and finally that the prosecution of witnesses who gave false evidence in an inquiry such as that in question was obviously in the interests of justice.

Petition for revision of the order of Captain C. P. Egerton, District Magistrate, Moollan, dated 27th January 1899.

S. P. Roy, for petitioners.

The judgment of the learned Judge was as follows :—

REID, J.—Section 17, Act XXXVII of 1850, runs as *20th Feby. 1899.* follows :—

“ All witnesses either for the prosecution or defence shall be examined on oath, or if exempted from taking an oath in Courts of Justice, on solemn affirmation, to be administered in either case by one of the Commissioners; and every witness so examined and wilfully giving false evidence on any material point shall be deemed guilty of, and liable to, the penalties of perjury.”

It was repealed by Act XII of 1876, a repealing Act passed because it was expedient that enactments which had ceased to be in force otherwise than by express and specific repeal, or had by lapse of time or change of circumstances become unnecessary, should be expressly or specifically repealed.

It is contended that by repealing Section 17 the Government of India intended that witnesses who gave false evidence before a Commission appointed under the Act should not be punishable. This contention has no force. Act XXXVII of 1850 enforces the Commissioners appointed under it to receive and record evidence, and under Section 4 of the Oaths Act (X of 1873) they are authorised to administer oaths and affirmations in the exercise of the powers so conferred on them. Under Section 14 of the latter Act witnesses before them are bound to state the truth. The passing of the Penal Code and the Oaths Act obviously rendered Section 17 of the Act of 1850 unnecessary, and it was struck out of the Statute book.

It is unnecessary at this stage to consider whether the proceedings before the Commission for the trial of Sardar Gurdial Singh were or were not judicial proceedings, either with reference to Section 193 of the Indian Penal Code, or with reference to the sanction under Section 195 of the Code of Criminal Procedure. The latter part of Section 193 applies even if the proceedings were not judicial, while the District

Magistrate could take cognizance under Section 190 of the Code of Criminal Procedure if the Commissioners had no power to sanction under Section 195.

The application for sanction and the sanction, read together, are sufficiently explicit, as is admitted by counsel whose contention that the sanction must contain all particulars, independently of the application, has no force, and is opposed to the authorities followed by this Court.

The question whether the Commissioners were *functi officio* when they granted sanction has been expressly reserved by the Court below and need not be considered here at this stage.

Under the circumstances, I concur with the District Magistrate in holding that the sanction is not bad for want of notice, and it is obvious that the prosecution of witnesses who give false evidence in an inquiry such as that in question is in the interests of justice. No attempt has been made to support ground 3 (3). I reject this application.

Application dismissed.

REVENUE JUDGMENTS,
1898.

REVENUE JUDGMENTS.

No. 1.

*Before the Hon'ble Mr. S. S. Thorburn, Officiating
Financial Commissioner.*

JIWAN SINGH,—(DEFENDANT),—PETITIONER,

Versus

MAHARAJA JAGGAT SINGH AND ANOTHER,—
(PLAINTIFFS),—RESPONDENTS.

} REVISION SIDE.

* Case No. 459 of 1896-97.

*Punjab Tenancy Act, 1887, Sections 6, 8, 56, 60—Transfer of rights by
occupancy tenant—Acquiescence on part of landlord, effect of—Facts constituting
acquiescence.*

Held, that when a tenant holding under Section 6 or Section 8 of the Punjab Tenancy Act, 1887, has transferred his right of occupancy without having previously obtained the consent of that landlord in writing, unless that landlord sues within a reasonable time to cancel the voidable transfer his acquiescence may be inferred, and, if proved, will disentitle him to the relief claimed, although his suit has been instituted within the period of limitation, viz., within 6 years from the date when the right to sue accrued.

Held further, that though "a reasonable time" must depend on the circumstances of each case, yet in cases in which the payment of rent by the alienee to the landlord or his representative is proved or may be legally presumed, he having already full knowledge of the status of the alienee, the acceptance of such rent by the landlord and his omission to sue for the cancelment of the voidable transfer constitute, in the absence of any satisfactory explanation of his conduct, acquiescence on his part in the transfer.

Held, on the facts of the present case, that the landlord had acquiesced in the transfers, and that, therefore, his suit must be dismissed.

*Petition for review of the order of the Financial Commissioner,
Lahore, dated 17th August 1897, rejecting an application for
revision of the order of Captain Dallas, Collector of Amritsar,
dated 17th June 1897.*

The application for review was accepted by the following judgment of

* Revision Case No. 460 of 1896-97 was also disposed of by the judgment in this case—*Ed., P. R.*

28th Jany. 1898. THE FINANCIAL COMMISSIONER.—Here are two applications for review of orders passed 17th August, 1897 rejecting applications for revision in cases Nos. 459 and 460 of 1896-97. As the parties are the same, and the facts nearly identical, one order will cover both cases.

The relevant facts are as follows:—

In 1892 two brothers, one named Ghamanda Singh, the other Jhanda, both found by the first Court to be occupancy tenants, under Section 6, Punjab Tenancy Act, mortgaged with possession their respective holdings to one Jiwan Singh, in whose favor mutation was effected in July 1893. At the time the landlord's representative objected in both cases, but unsuccessfully, possession having already been delivered. He was told to seek his remedy in a regular suit. So far the two cases are alike. Here divergence occurs.

In case No. 460, in which Ghamanda Singh was alienor, the mortgagee had to sue him for possession, and decree was given in his favor immediately before mutation was effected. Further, in 1896, mortgagee put in an application "for possession and costs" against Jhanda, who had meanwhile succeeded to his brother, Ghamanda Singh's, rights on that brother's death without issue. The application was filed as the mortgagee was already in possession, cultivating through the aforesaid Jhanda as his sub-tenant. The mortgagee explains that all he wanted was costs, but that the petition-writer carelessly wrote down "possession and costs."

The plaintiff, landlord's representative, sued in October 1896 to have both the 1892 mortgages set aside, on the grounds that they had been effected "without the previous consent in writing of the landlord" (Section 56, Punjab Tenancy Act). He also sought to dispossess the mortgagee. The defence was that as at the time (1892), and again on mutation (1893), plaintiff had full knowledge of the transfers, and had afterwards without demur for more than 3 years received the lump sum rent from the mortgagee, he could not now succeed in his claim, having already by his inaction in not suing earlier, and by his action in accepting the rent harvest after harvest, acquiesced in the two otherwise voidable transfers. Further, it was alleged and admitted that the mortgagor's father, Sudda, had since 1883 repeatedly mortgaged and resumed his occupancy holding, or parts thereof, either with the oral consent of, or without objection from, the landlord's representative.

This fact was rightly held to be irrelevant to the issue by the Lower Courts. That issue was whether on the facts plaintiff had or had not acquiesced in the two transfers. The first Court's decision turned on the question of payment of rent by alienee to plaintiff. The Assistant Collector, 1st grade, wrote as follows in his judgment :—

“In regard to payment of rent the mortgagee has produced no receipt or any proof that he has been paying it. The defendant (mortgagor) first stated that the mortgagee had been paying the rent, but on a subsequent date he stated that he himself had been doing so, and that his first statement was false. His subsequent statement is supported by the receipts entered in his *khatauni*, which has been filed by him. I hold therefore that the payment of rent by the mortgagee has not been proved, and there has been no acquiescence.”

On appeal the Collector upheld the decision on the same grounds, but added one additional reason, *viz.*, that in 1896 mortgagee “does not appear to have been put in possession, for we find that in July 1896 he applied for possession, though his suit was dismissed in default.”

Application for revision was rejected, as already stated, on 17th August 1897. Application for review has now been made chiefly on the ground that in 1896-97, in other suits in which the circumstances were almost the same as in these, the village, the plaintiff and most of the facts being the same, the local courts held that acquiescence was established, and the Financial Commissioner rejected the landlord's petitions for revision. These cases will be presently referred to. Copies of judgments in these other suits being produced and a *prima facie* case for review made out, the parties were summoned and heard.

As to the question of payment of rent by alienee, as he was admittedly in possession, and as his name was regularly entered by the *Patwari* in the *Fard Bachh*, and as there is no dispute about arrears, the reasonable presumption was that alienee had been paying rent to his landlord. The onus of proving payment should not have been thrown on the alienee, but the plaintiff should have been required to prove receipt of rent from the alienor. That mortgagee could produce no receipts was natural, the taking and keeping receipts being rare. In his evidence Jhanda, mortgagor, first stated that the mortgagee in possession had been paying the rent. But thirty-three days afterwards he deposed that he had been lying, and the truth was that he and the mortgagee were in the habit of

going together to the tahsil of the State, where mortgagee handed him the rent and he passed it on to plaintiff. In support of this new story he produced a *khatauni* containing receipts in which the mortgagee's name is not mentioned. The receipts were for the kharifs of three years. It is on these receipts that stress is laid by the first Court (see passage quoted above from the judgment). I think Jhanda's tergiversation should have roused suspicions, and that receipts should have been proved. On examination I find that the receipts in the *khatauni* were written by plaintiff's *Moharrir*, one Kirpa Ram, and signed by plaintiff. The Patwari had no hand in the preparation of these receipts, and they were not proved. No inference can be drawn from the curiously late production of this suspicious *khatauni*.

As to the 1896 application by the mortgagee, on which the Collector lays stress, Jiwan Singh, mortgagee, stated his debtor, Ghamanda Singh, had died, and his heir and successor was Jhanda, so he wanted possession against Jhanda and costs in the 1893 suit. He further mentions mutation had been effected in his name on July 15th, 1893. Jhanda replied mortgagee was already in possession, that he himself was deaf, blind and a pauper, and had no concern with the land whatsoever. The application was filed in October. This does not show that mortgagee was not in possession in 1896, but the reverse. Further, Jhanda's statement goes to demonstrate that he had been bought over by the plaintiff between the date of his first deposition about rent (22nd December 1896) and his subsequent change of front (1st February 1897).

Such being the facts, do they constitute acquiescence on plaintiff's part in the voidable transfers, and, broader, what conduct on the part of a landlord is necessary for the inference of his acquiescence?

The published Rulings bearing on the latter question are as follows:—

In Civil Ruling No. 47 of 1872, quoted with approval in Civil Ruling No. 82 of 1881, it was found that 2½ years before the suit was brought the defendants (tenants), without the express permission of the plaintiffs (owners), planted certain fruit trees which plaintiffs sued to have removed. It was held that plaintiff's delay, which was not explained, in coming forward to object to the planting of the trees, and the planting of such trees being customary in the village, were circumstances from which permission might be inferred, and accordingly plaintiffs' suit failed.

In No. 82 of 1881, where it was found that an occupancy tenant mortgaged with possession his occupancy rights, and the owner made no objection for five years until he was summoned in connection with mutation proceedings, and on account of his objection mutation was refused, whereupon the said owner a year and a quarter later sued to eject the mortgagee from the land, it was held that the owner must be taken to have acquiesced in the transfer.

In No. 161 of 1883 the Chief Court held that if, with full knowledge of the facts, a landlord intentionally acts in such a manner as to affirm the transfer, he cannot afterwards disaffirm it.

In No. 100 of 1887, where it was found that a mortgagee had been in open possession since 1873, the Chief Court held that the conduct of the landlord had cured any original defect in the mortgage.

In No. 26 of 1889 Mr. Justice Rattigan, following Nos. 82 of 1881 and 100 of 1887, observed that, although a tenant can defeat his landlord's action, brought with intention to cancel an alienation, by proving that the landlord had subsequently ratified his tenant's act, any such plea required the clearest and most unequivocal evidence to support it. In the case under consideration the Judges found that the suit had been brought within two and a half years after the mortgage had been made, and the only act proving ratification was that the landlord had accepted rent and revenue from the mortgagee in possession for two harvests before the suit was brought. The plaintiffs explained that the mortgagee was the mortgagor's tenants' banker, and that they (the plaintiffs) had only become aware of the mortgage eight months before they brought the suit. The learned Judges held that the mere receipt of money from the mortgagee did not prove a knowledge (by the plaintiffs) of the fact of mortgage. All these rulings are under the old law (Act XXVIII of 1868); but between it and the present law (Act XVI of 1887) the only change is that the landlord's previous consent must now be "in writing." That restrictive addition in no way affects the curing effect of acquiescence.

No revenue judgments bearing on the question of what constitutes acquiescence have yet been published as rulings, but the records of the two recent cases, Nos. 450 and 478 of 1896-97, already referred to in this judgment, have been examined. The facts in these two cases are, that in one, in 1891, and

in the other, in 1888, occupancy tenants mortgaged and mutated their holdings in this village, and the landlord's representative, the present plaintiff, did not sue to cancel the mortgages and dispossess mortgagees until 1896. The evidence about the payment of rent by the mortgagees was inconclusive, but the Courts presumed that the mortgagees in possession had paid it. The landlord's acquiescence in the transfers was held to be established by his conduct.

I may here note that the period of limitation for bringing a suit to void a voidable transfer is six years from date on which cause of action arises, *i.e.*, the date on which the right to sue accrues (see Civil Ruling No. 135 of 1888). Upon consideration of all the circumstances bearing on the question of acquiescence, it appears to me that when a landlord is fully aware that a tenant holding under Section 6, or Section 8, Punjab Tenancy Act, has transferred his right of occupancy without having previously obtained the consent of that landlord in writing, unless that landlord sues within a reasonable time to cancel the voidable transfer, his acquiescence may be inferred. As to what period constitutes a "reasonable time" must depend on the circumstances of each case: in some it might be two years, in some three or more. But in cases in which the payment of rent by the alienee to the landlord or his representative for more than one harvest is proved or may be legally presumed, he having already full knowledge of the status of the alienee, I hold that, in the absence of satisfactory explanation for his conduct, his acceptance of the rent without bringing a suit for the cancelment of the voidable transfer is an act which amounts to acquiescence. Applying these general conclusions to the two cases before me, I find that under the circumstances special to them the plaintiff did not sue within a reasonable time, and, further, that there being a reasonable presumption that plaintiff did receive the rent for three years from the alienee, Jiwan Singh, before he decided to sue to cancel the two mortgages, he clearly acquiesced in these transfers and cannot succeed in his suits. For these reasons I accept the present applications, reverse the orders of the Lower Courts, and dismiss both suits. Each party will bear his own costs throughout. This order will be communicated to parties by the Collector, as having heard the parties on the 25th instant I reversed judgment and informed them that the result would be afterwards communicated to them in the above way.

Application allowed.

No. 2.

*Before the Hon'ble Mr. S. S. Thorburn, Officiating
Financial Commissioner.*

BAKSHSA,—(DEFENDANT),—PETITIONER,

Versus

FATEH MUHAMMAD,—(PLAINTIFF),—RESPONDENT.

} REVISION SIDE.

Case No. 497 of 1896-97.

Punjab Tenancy Act, 1887, Sections 6, 8, 51, 53, 56, 57, 60—Exchange of rights of occupancy without consent of landlord—"Transfer"—Right of landlord who has acquiesced in such transfer to subsequently sue to avoid it—Acquiescence, what constitutes.

An exchange of their respective holdings by two tenants holding under Section 8 of the Punjab Tenancy Act, 1887, is a "transfer" within the meaning of Section 56 of the Act.

When a landlord is fully aware that a tenant, holding under Section 6 or Section 8 of the Act, has transferred his right of occupancy without having previously obtained the consent in writing of that landlord, unless the latter sues within a reasonable time to cancel the voidable transfer, his acquiescence therein may be inferred, and, if proved, will disentitle him to the relief claimed, although his suit is instituted within six years from the date of transfer. As to what period constitutes "a reasonable time" must depend on the circumstances of each case, but in cases in which the payment of rent by the alienee to the landlord or his representative is proved or may be legally presumed, he having already full knowledge of the *status* of the alienee, in the absence of satisfactory explanation by the landlord for his conduct, the acceptance of rent for more than one harvest without bringing a suit for the cancelment of the voidable transfer is an act which amounts to acquiescence.

Petition for revision of the order of T. H. Homan, Esquire, Collector, Dera Ismail Khan, dated 13th July 1897.

Harris, for petitioner.

Duni Chand, for respondent.

The facts of the case fully appear from the following judgment delivered by

THE FINANCIAL COMMISSIONER.—The relevant facts are as 31st Jany. 1898. follows :—

Two tenants holding under Section 8, Punjab Tenancy Act, exchanged holdings under the same landlord, possibly in 1884, but certainly in 1891, in which latter year mutation was effected. In 1896 one of the joint landlords sued, as he could do under Civil Ruling No. 65 of 1894, to cancel one of the transfers, it not having been made with his previous consent in writing, and for the ejectment of the transferee.

The first Court found that—

- (1) the exchange was a transfer within the meaning of Section 56 of the Act,
- (2) it dated not from 1884, but 1891,
- (3) it was made in a way not recognised by law, and
- (4) the defendant, transferee, had “not proved that plaintiff’s conduct was such as now to serve as an estoppel against him.”

A decree was accordingly given in plaintiff’s favor. On appeal the Collector agreed that “the exchange amounted to a sale,” but held that the plaintiff’s long silence, and the fact that he had collected “revenue” for years from the transferee, amounted to acquiescence. The Collector accordingly accepted the appeal and dismissed the suit.

On further appeal to the Commissioner (Mr. H. A. Anderson) that officer remanded the case, and pointed out that under the present law the transfer required the previous consent in writing of the landlord, hence the question was whether it occurred in 1881, in which case it was governed by the old law, or in 1891, in which case under the latter law, the clear provision of the law could not be overridden by acquiescence.

On remand the Collector found that the transfer was made in 1891, and, as enjoined, held “the exchange invalid as made “without the consent in writing of plaintiff after Act XVI of “1887 had come in force.” The decision of the first Court was therefore upheld, and decree given for plaintiff.

The defendant, transferee, has applied for revision on the ground of material irregularity, in that acquiescence was proved, and under the old as well as under the new Act such acquiescence condoned the original defect in the mode in which the transfer was made. The application was admitted and the points argued by the respective counsel of parties.

The points for decision are—(1) whether an exchange is a transfer within the meaning of Section 56, Act XVI of 1887, and (2) whether with reference to that section acquiescence cures an irregular transfer, the suit being brought within period, i.e., within six years from the date on which the right to sue accrues (Civil Ruling No. 135 of 1888).

On the first question plaintiff’s counsel contends that, throughout the Punjab Tenancy Act, an exchange, wherever mentioned, is referred to as if it were a right exercisable by any occupancy tenant, e. g., Section 7 begins—“If the tenant has

"voluntarily exchanged the land"; and Sections 53 and 57 are referred to as confining "transfers" under Section 56 to those made "by sale, gift or mortgage" only. Thus it is argued an exchange is not a voidable transfer at all. Now, neither in the above sections nor elsewhere does the Act authorise an exchange without the landlord's consent. All that it does is to define rights of tenants in exchanged lands. I find that an exchange is a transfer within the meaning of Section 56 of the Act.

As to the second question, it is correct that under the Civil Ruling above quoted the period of limitation for suits of this class is six years, and that the Punjab Tenancy Act declares a transfer "without the previous consent in writing" of the landlord (Section 56) shall be voidable at the instance "of the landlord" (Section 60). But the deduction that within that period a landlord can at any time, no matter what his conduct has been, void any transfer not made in conformity with Section 56 is incorrect. That under the present law (Act XVI of 1887) the words "in writing" have been added to the provision under the superseded law (Act XXVIII of 1868); requiring the landlord's previous consent does not alter the fact that a voidable transfer can be validated by subsequent conduct on the part of the landlord showing that he has acquiesced in the transfer.

The question of what constitutes acquiescence has been considered in my judgment in case * No. 495, dated 28th January 1898. I there held that "when a landlord is fully aware that a tenant holding under Section 6 or Section 8 of the Punjab Tenancy Act has transferred his right of occupancy without having previously obtained the consent of that landlord in writing, unless that landlord sues within a reasonable time to cancel the voidable transfer, his acquiescence may be inferred." As to what period constitutes "a reasonable time" must depend on the circumstances of each case: in some it might be two years, in some three or more. But in cases in which the payment of rent by the alienee to the landlord or his representative is proved or may be legally presumed, he having already full knowledge of the status of the alienee, I hold that in the absence of satisfactory explanation for his conduct by the landlord, the acceptance of rent for more than one harvest without bringing a suit for the cancelment of the voidable transfer is an act which amounts to acquiescence.

* No. 1, Punjab Record, 1898, Rev. judgments—Ed. P. R.

Now in this case five years had elapsed since mutation, and during those years the plaintiff had been accepting not simply "revenue" but "rent" from the transferee, hence acquiescence is proved.

I accept the application for revision and dismiss plaintiff's suit, and decree defendant, transferee, his costs throughout.

Application allowed.

No. 3.

Before the Hon'ble Mr. S. S. Thorburn, Financial Commissioner.

CHINGA,—(PLAINTIFF),—PETITIONER,

Versus

MANGAT RAM AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

REVISION SIDE. }

Case No. 63 of 1897-98.

Punjab Tenancy Act, 1887, Sections 5, 6, 8—Suit for declaration of occupancy status of highest class—Duty of Court to consider whether plaintiff entitled to inferior right than that claimed—Civil Procedure Code, 1882, Section 53—Material irregularity—Collector deciding appeal in absence of record, which had been lost.

Plaintiff's suit for a declaration of occupancy status under Section 5 (i) (a) of the Punjab Tenancy Act, 1887, was dismissed by the lower Courts on the ground that as he and his ancestors had always paid half *batai*, he was not entitled to the status claimed. It appeared, however, that plaintiff and his ancestors had held the land for over 40 years before 1870, and had planted fruit trees and erected buildings thereon, but the lower Courts had dismissed the suit without considering whether such occupation entitled the plaintiff to occupancy rights under Section 8 of the Act. It further appeared that the record of the case in the first Court was lost before the Collector heard the appeal.

Held, that the lower Courts had committed a material irregularity in dismissing the suit without considering whether, with reference to the facts of the case and the district practice, plaintiff was not entitled to occupancy rights of a class inferior to that specifically claimed in the plaint, it being the duty of the Court, in a case such as the present, either to return the plaint for amendment or to amend it itself under Section 53, Civil Procedure Code, *proviso*, and to thereafter frame an issue which should cover the other clauses of Section 5 and Sections 6 and 8 as well.

Held, farther, that the fact that the Collector had had to decide the appeal without being able to examine the record would alone have been a sufficient cause for a remand.

Petition for revision of the order of Major F. Egerton, Collector of Dharmasala, dated 24th September 1897.

Jaishi Ram, for respondents.

The following judgment was delivered by

THE FINANCIAL COMMISSIONER.—The suit of a tenant for 31st Jany. 1898. declaration of occupancy status under Section 5 (1) (a) has been dismissed, as he had always paid half *batai* and could not therefore have the status sued for. "If it is proved," said the Collector in his order dismissing the appeal, "that the tenant and his ancestors paid half *batai*,—and this is admitted by the plaintiff,—this in itself is sufficient to show that the plaintiff is not entitled to claim occupancy rights." Plaintiff applies for revision. He is an ignorant peasant; the defendants three high-placed revenue officials, also a barrister and a money-lender. Their pleader has argued the case for them. The plaintiff and his ancestors have admittedly held the land for quite 40 years before 1870, have planted fruit trees and erected buildings on the land, and it is probable, or at least possible, that such occupation entitles the tenant to occupancy rights under Section 8. It appears to me that the Courts below have committed a material irregularity in not considering whether, with reference to the facts in this case and the district practice, plaintiff is not entitled to occupancy rights of a class inferior to that specially set forth in the plaint. Though a plaintiff may not receive more than he asks for, there is no reason why he should not receive less, provided that the decree is not different in character, or inconsistent with the claim as brought. Thus when, as here, the plaintiff claimed an occupancy status of the highest class under Section 5 (1) (a), Punjab Tenancy Act, it was the duty of the Court either to return the plaint for amendment or, better, to amend it itself (see *proviso*, Section 53, Civil Procedure Code), as is the practice in Revenue Courts. Thus in this suit the issue should have been framed so as to cover the other causes under Section 5 (1) and Sections 6 and 8 as well.

I accept application and remand case for further inquiry and decision on merits with reference to above remarks.

I may add that neither Collector nor myself have had sufficient material before us for a full consideration of the facts, as the record of the case in the first Court was lost before the Collector heard the appeal. The loss may have benefited either party or neither, but looking to their respective positions, I hardly think this disappearance can have been useful for the plaintiff.

The fact that the Collector had to decide the appeal without being able to examine the record would alone have been a sufficient cause for a remand.

Application allowed : cause remanded.

No. 4.

Before the Hon'ble S. S. Thorburn, Financial Commissioner.

REVISION SIDE. { MALANG,—(PLAINTIFF),—PETITIONER,
Versus
MUSSAMMAT NAMITTI AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

Case No. 221 of 1897-98.

Punjab Land Revenue Act, 1887, Sections 13, 112, 116, 118—Application for partition—Plea that holding had been already partitioned privately—Course of appeal—Question “as to property to be divided” or “as to title in the property of which partition is sought”—Entries in Settlement Records.

Plaintiff applied to the Assistant Collector for partition of certain land recorded as jointly held by him and defendants. The latter resisted partition on the ground that the land had already been privately partitioned though effect to such private partition had not been given in the annual papers. The Assistant Collector prepared a mode of partition for part of the land, but refused the application in regard to the balance, whereupon plaintiff appealed to the Collector for partition of the rest of the holding. The Collector returned the appeal and directed it to be presented to the Commissioner, as the dispute concerned “the property to be divided” within the meaning of Section 118 (1) and (2) of the Punjab Land Revenue Act, 1887. The Commissioner held that the order of the Collector was wrong, and referred the question of jurisdiction to the Financial Commissioner.

Held, that the appeal lay to the Collector and not to the Commissioner, the objection that certain land had already been partitioned, though still recorded as jointly held, disputing the correctness of an entry in a record presumed to be true, and consequently raising “a question of title” within the meaning of Section 116 of the Punjab Land Revenue Act, 1887.

The principles which should guide the Courts in such cases explained. *Case referred under Section 16 (3), Punjab Land Revenue Act, 1887, by J. M. Douie, Esquire, Commissioner of Lahore.*

The following judgment was delivered by

1st July 1898.

THE FINANCIAL COMMISSIONER:—Applicant sought partition of 2,707 *kanals* 14 *marlas* recorded as jointly held by him and respondent. The latter resisted partition on the ground that the land had already been privately divided, though effect to such private partition had not been given in the annual papers.

After inquiry the Assistant Collector prepared a mode of partition for 443 *kanals* 19 *marlas*, and refused the application in regard to the balance 2,263 *kanals* 15 *marlas*. Applicant then appealed to the Collector for the partition of the rest of the holding. The Collector (Mr. Douie) returned the appeal

to the applicant and directed him to present it to the Commissioner as the dispute concerned "the property to be divided" (Section 118 (1) and (2), Land Revenue Act), in which case appeal lay to Commissioner, not to Collector.

On presentation of the appeal to him the Commissioner (Colonel Hutchinson) passed the following order:—

"The question is one of fact, *viz.*, whether certain land had formerly been divided or not. It is not a question as to what land is referred to. The application is to partition certain definite lands. The fact as to whether those lands had been divided formerly or not is not one that can be decided in this Court. I think the Collector is wrong. I therefore return the papers for the appeal to be heard in his Court. But if he thinks a reference ought to be made to Financial Commissioner I will do so."

Upon that the Collector referred the question of jurisdiction to me under Section 16 (3), Land Revenue Act, and in reporting the case gave his opinion as follows:—

"I think it would be a good thing to make such a reference. I think there is considerable doubt about the proper course of appeal in partition cases. My reasons are briefly as follows:—

"When a partition case comes up for hearing, the Revenue Officer may absolutely disallow partition (Section 115). If he does so an appeal lies to the Collector (Section 13). If he does not disallow the partition he is to determine what are the questions in dispute, distinguishing between—

- (a) "questions as to title in the property of which partition is sought," and
- (b) "questions as to the property to be divided or the mode of making the partition" (Section 116).

"Section 117 deals with the procedure in regard to the first class of questions. It will be observed that if the Revenue Officer decides these himself, his decision is treated as that of a District Judge and appeal lies to the Divisional Judge. Section 118 deals with the second class of questions referred to in Section 116, and provides that orders are appealable to the Commissioner. At first sight it would appear that the only cases in which appeal would lie to the Collector are those in which partition is refused. But suppose the Revenue Officer neglects to deal with questions of title in either of the ways laid down in Section 117, and an appeal was lodged on this account, presumably the Collector would hear it on the ground

that Section 13 must be taken as covering all cases not expressly provided for. This would also apply to an appeal on the ground that the partition was not actually carried out in accordance with "the mode of making the partition laid down by the Revenue Officer." What is wanted is some definition of the meaning to be given to the phrase "questions as to the property to be divided." The words are very wide, and cover, I think, the question raised in the present case as to whether 2,766 *kanals* or only 443 *kanals* should be divided.

"It is by no means unlikely that it was intended that the Commissioner should be the appellate authority in a great many partition cases. This view derives some little support from the fact that the only Section of the Act, as distinguished from the rules under it (see Rule 274), which declares that the 'Revenue Officer' engaged in a particular proceeding shall be 'of a class not below that of Assistant Collector of the 1st grade' is, so far as I am aware, Section 126, referring to partition cases."

As Mr. Douie was now Officiating Commissioner, he sent on the papers to me without recording any further opinion.

My finding on the reference made is as follows :—

The objection raised was that the joint holding had already been privately divided and could not be re-partitioned. The question referred is whether such an objection is an issue "as to the property to be divided" or "as to title in the property of which partition is sought" (Section 116, Land Revenue Act). If the former, the Commissioner would decide the appeal; if the latter, the Collector (Sections 13 and 118, Land Revenue Act).

I think that the distinction between the two classes of questions, though necessarily sometimes very fine, is ordinarily clear, as the former class usually concerns one or other of the particulars set forth in Section 112 of the Act, and the latter directly raises an issue of title. In cases of doubt the guide for decision should be, it seems to me, whether or no the objection impugns the correctness of an entry affecting title in the Settlement or Annual Record, or to follow the wording of the old Rule 4, Part II, under Section 65 of the superseded Act (XXXIII of 1871) is of a kind "calling in question the correctness of an entry in the Record-of-Rights, upon which the shares to be assigned to the parties * * * * * may depend."

CHIEF COURT CIRCULAR ORDERS,
1898.

CHIEF COURT CIRCULAR ORDERS.

ADDENDA TO CIRCULAR ORDERS, VOLUME III.

No. 103.

Dated 7th February 1898.

Add the following to Part V of List A, Appendix I, page 230, of Circular Orders, Volume III.

Law of Divorce applicable to Christians in India, by H. A. B. Rattigan, Barrister-at-Law.

CIRCULAR MEMO. No. 1—580 G. of 1898.

To

ALL SESSIONS JUDGES AND DISTRICT MAGISTRATES IN THE PUNJAB.

Dated 8th February 1898.

IN accordance with the request of His Honor the Lieutenant-Governor of the Punjab, communicated in the Junior Secretary's letter No. 35, dated the 31st January 1898, of which

SUBJECT.

Enforcements of warrants of commitments by convicting Courts with the nature of the crime, whether the prisoner is a professional, hereditary or specially dangerous criminal.

the relevant paragraphs are quoted below, the Judges are pleased to direct that, in every case of a sentence for dacoity, or other organized crime, the convicting Court shall enter on the warrant of commitment, for the information of the Jail Authorities, the nature of the crime, and whether the prisoner is a professional, hereditary or specially dangerous criminal.

2. If in any case this information be not entered, the Jail Authorities will refer the warrant to the Court, which should then have the proper entry made on it.

3. If there is any doubt as to the entry to be made, the Court should decide the question by a reference to the record of the case, or by further inquiry, if necessary.

1. Under clause (5) of Section 59 of the Prisons Act, 1894, certain rules, promulgated with the Resolution in the Home Department (Jails) No. 12 Jails, dated 31st August 1896, have been made by the Government of India on the subject of the award of marks and the shortening of sentences. The first of these rules provides for the division of convicted prisoners into three classes, namely :—

- (1). Thugs, robbers, by administration of poisonous drugs, and professional, hereditary or specially dangerous criminals, convicted of heinous organized crime, such as dacoity.
- (2). Dacoits and other persons convicted of heinous organized crime, who are not professional, hereditary or specially dangerous criminals.
- (3). All other prisoners. The object of this classification is to determine the effect of any remission which may be earned under the rules; and it is thus a matter of importance that Jail officials should be furnished with reliable information to enable them to classify prisoners correctly.

3. It has now been decided by the Lieutenant-Governor, after reference to the Government of India, that the proper course is not to issue the proposed instructions in the form of supplementary rules having the force of law under clause (5) of Section 59 of the Prisons Act, 1894, but to ask the Judges to issue them as executive instructions for the guidance of the Courts. I am accordingly to request that, if the Judges have no objection, the necessary orders may issue.

CIRCULAR MEMO. No. 2—641 G. of 1898.

To

ALL JUDICIAL OFFICERS IN THE PUNJAB. .

Dated 11th February 1898.

THE Judges find it necessary to point out that, when an application for the transfer of a case is made by any party thereto, it is in neither proper nor expedient to reject it summarily in the first instance and subsequently, when the matter has gone to a higher Court, to grant it without further inquiry on the ground that the mere fact that transfer has been applied for is likely to prejudice the Court against the applicant.

2. Litigants should be made to clearly understand that an allegation of facts in support of an application for transfer—which should always be made on oath or by affidavit—is a very serious matter, that when made it will be fully inquired into, and that if it be found to be false, not only will the application be rejected, but the person making the allegation will be liable to prosecution under Section 193, Indian Penal Code.

3. When therefore an application for transfer contains an allegation which, if true in fact, would be a good ground for transfer, the Court to which the application is made should not reject it without inquiry because it considers that the allegation is probably untrue. The truth or falseness of the allegation should be at once fully inquired into, and further action should be taken according to the result of the inquiry.

CORRECTION SLIP No. 104.

Dated 11th February 1898.

On page 60, Instructions to Judicial Officers (Volume II), Section VIII, after paragraph 40, add the following:—

40a. Every process for service in the town of Mauritius shall be accompanied by a remittance of Rs. 3 per person to be served. If the process is to be served in the country, a further sum at the rate of 75 cents. or about two rupees per mile (to and fro) should be remitted. When documents are written in the vernacular, a sum of Rs. 10 should be remitted as translation charges. But in all cases an English translation should be sent.

No. 105.

Dated 16th February 1898.

In Volume II of the Chief Court Circulars, "Instructions to Judicial Officers," Section XXXV, paragraph 47, for "four weeks" read "three weeks."

GENERAL LETTER No. 1449 G. OF 1898.

To

ALL CIVIL AND CRIMINAL COURTS IN THE PUNJAB.

Dated 14th April 1898.

IN continuation of this Office General Letter No. 1618 G., dated the 12th May 1897, on the subject of law touts, I am directed to furnish, in place of the list sent therewith, a fresh list showing also the address of the persons named.

The name of Narain Das, No. 23, is an addition to the list.

List of persons proved to the satisfaction of the Chief Court to habitually act as touts.

[Enclosure to General Letter No. 1449 G., dated 14th April 1898.]

No.	Name.	Father's Name.	Caste or Occupation.	RESIDENCE.		
				Village.	Police Station.	District.
1	Kanh Singh ...	Khushal Singh	Jat ...	Kucha Beli Ram, Gumti Bazar.	Lahore ...	Lahore.
2	Fazl Din ...	Muhammad Ishaq.	Arain ...	Hakiman Bazar, Bhāti Gate.	Do. ...	Do.
3	Mir Bas Khan ...	Gulab Khan ...	Pathan ...	Balachor ...	Bilaspur ...	Umballa.
4	Manda ...	Ghulam Mustafa	Do. ...	Katra Mahan Singhwala.	Amritsar ...	Amritsar.
5	Kala ...	Alla Bakhsh ...	Rajput ...	Hakiman Bazar, Bhāti Gate.	Lahore ...	Lahore.
6	Nur Din ...	Khuda Bakhsh...	Jogi ...	Jogi Mohalla, Hakiman Bazar.	Do. ...	Do.
7	Mirza Karm Beg	Ahmad Beg ...	Moghal ...	Rasulnagar...	Alipur ...	Gujranwala.
8	Fazl Din ...	Karm Beg ...	Do. ...	Do. ...	Do. ...	Do.
9	Chanan Beg ...	Karm Beg ...	Do. ...	Do. ...	Do. ...	Do.
10	Jamal Khan ...	Azim Khan ...	Pathan ...	Baffa ...	Shankiari	Hazara.
11	Ram Chand ...	Ram Parshad ...	Brahman ...	Mohalla Rohan.	Agra ...	Agra.
12	Nawab Khan ...	Pir Bakhsh ...	Rajput ...	Lohari Gate	Lahore ...	Lahore.
13	Ali Bakhsh ...	Asimullah ...	Bhathiyara ...	Sarai Muhammad Shafi.	Do. ...	Do.
14	Ahmad Ali ...	Din Muhammad	Mujawar ...	Darbar Data Ganj Bakhsh	Do. ...	Do.
15	Ghulam Mohy-ud-din.	Ali Muhammad	Do. ...	Do. ...	Do. ...	Do.
16	Dyal Singh ...	Sahib Singh ...	Jat ...	Duhala ...	Khudian ...	Do.
17	Letna Singh ...	Dyal Singh ...	Do. ...	Do. ...	Do. ...	Do.

List of persons proved to the satisfaction of the Chief Court to habitually act as touts—concluded.

No.	Name.	Father's Name.	Caste or Occupation.	RESIDENCE.		
				Village.	Police Station.	District.
18	Kanhya Singh ...	Budh Singh ...	Brahman ...	Mori Gate ...	Wazirabad	Gujran-wala.
19	Thekur Singh ...	Amrik Singh ...	Jat ...	Bhasin ...	Munawan	Lahore.
20	Sonda ...	Bhoru Khan ...	Muhammadian	Chungar Mo-halla, Lunda Bazar.	Lahore ...	Do.
21	Alla Bakhsh ...	Umar Bakhsh	Do.	Jhang ...	Jhang ...	Jhang.
22	Devi Das (<i>alias</i> Malku).	Sukh Dyal ...	Khatri ...	Madar ...	Lilla ...	Jhelum.
23	Narain Das (<i>alias</i> Naraina).	Udho Ram (Shan-kar Das).	Do. ...	...	Amritsar ...	Amritsar.

CORRECTION SLIP No. 106.

Dated 15th April 1898.

IN Schedule (C) of Correction Slip No. 3, attached to Appendix II of the Rules and Orders, as amended by Correction Slips Nos. 16, 40, 45 and 55, against the Simla district, for "16 process-servers, first grade, on Rs. 96," read "15 process-servers, first grade, on Rs. 90," and in the total of this column, for "956 process-servers, first grade, on Rs. 5,736" read "955 process-servers, first grade, on Rs. 5,730"; and against the Jhang district, for "2 Naib-Nazirs on Rs. 30" read "3 Naib-Nazirs on Rs. 45," and in the total of this column, for "155 Naib-Nazirs on Rs. 2,325" read "156 Naib-Nazirs on Rs. 2,340."

(In the column "Maximum cost per mensem," against the Simla district, for "Rs. 339" read "Rs. 333"; and against the Jhang district, for "Rs. 471" read "Rs. 486." In the total of this column, for "Rs. 19,456" read "Rs. 19,465.")

CIRCULAR MEMO. No. 3—1558 G. OF 1898.

To

ALL DIVISIONAL AND SESSIONS JUDGES, DISTRICT MAGISTRATES AND DISTRICT JUDGES, CANTONMENT MAGISTRATES, AND JUDGES OF SMALL CAUSE COURTS IN THE PUNJAB.

Dated 21st April 1898.

WITH reference to paragraph 4 of Section VII, Circular Orders, Volume III.

SUBJECT.

Date by which indents for vernacular judicial forms should be submitted to the Central Jail, Lahore.

regarding the supply of vernacular forms by the jail authorities, it is requested that officers who obtain their vernacular forms from the Central Jail, Lahore, will in future submit their indents yearly to the Superintendent, Central Jail, Lahore, by the 30th September of each year at least, instead of submitting quarterly, as appears to be the practice at present. The Superintendent of the Central Jail, Lahore, will thus be able to comply with all indents in proper time.

2. In preparing the indent care should be taken to form a proper estimate of the probable requirements for the year, so as to avoid the submission of any supplementary indent.

CORRECTION SLIPS.

No. 107.

Dated 28th April 1898.

Add as Rule 5 to Section VII, page 42, Circular Orders, Volume III :—

5. Officers who obtain their vernacular forms from the Central Jail, Lahore will submit their indents yearly to the Superintendent, Central Jail, Lahore, by the 30th September of each year at latest, so as to enable the Superintendent of the Central Jail, Lahore, to comply with all indents in proper time. In preparing the indent care should be taken to form a proper estimate of the probable requirements for the year, so as to avoid the necessity of submitting supplementary indents.

No. 108.

Dated 12th May 1898.

Substitute the following Rules for Rules 1 to 9 (both inclusive) of Section LXX, pages 334, 335, of Rules and Orders, Volume I :—

LXX.—Rules regulating the practice of the Chief Court in the hearing of causes and other matters.

RULES.

PART A.—HEARING OF CAUSES.

Hours of sitting.

1. The Court will be open daily, except on authorized holidays, between the hours of 10 a.m. and 5 p.m.

Roster of sittings.

2. The Judges will sit singly or in Benches of two or more Judges, in accordance with a roster to be framed from time to time, as occasion may require, by the Chief Judge.

Distribution of petitions.

3. Complaints, appeals, applications, and petitions will, in the first instance, be distributed amongst the Judges who are for the time being authorized to take petitions, in such manner as may from time to time be prescribed by the Chief Judge.

4. Causes will be set down for hearing before Benches and Judges sitting singly, in accordance with the roster for the time being, prescribed under Rule 2 :—

Provided that the Friday of each week will be reserved only for special causes requiring a first or preliminary hearing, and Full Bench causes. No other work shall be set down on such days.

5. Books of causes will be maintained by the Deputy Registrar, in which all the judicial business for disposal by the Court shall be entered by him, and dates shall be fixed for hearing, subject to the rules and practice of the Court, before such Judge or Judges as the Chief Judge may from time to time determine. Weekly cause lists for the Court and daily cause lists for each Bench of Judges, and for each Judge who sits singly, shall be prepared under the orders of the Deputy Registrar, from the books of causes, in the manner hereinafter provided.

6. No fresh case will ordinarily be called on for hearing, or other fresh business be entered upon by a Judge or Bench after 5 p.m., but the hearing of a part-heard case may be continued as long as the Court may deem necessary.

Fresh business not to be entered upon after 5 p.m.

7. Any Bench case begun and not finished before the Court rises will ordinarily be taken up as the first case at the next sitting of the same Judges, unless the Court otherwise orders, in which case a new date for further hearing will be fixed by the Deputy Registrar.

Case begun and not finished, to be taken up at next sitting of the same Judges.

Urgent applications.

8. (i). Urgent applications shall be laid before the Judge appointed for the day to hear such applications.

(ii). Every application for which urgency is claimed shall be submitted, in the first instance, to the Deputy Registrar, with a note of the grounds for considering it urgent. The Deputy Registrar will at once forward the application to the "Urgent Judge", who will, after reading it, either refuse to admit it, or fix the earliest time he conveniently can for hearing it.

9. (i). One General Cause Register shall be maintained by the Deputy Registrar, in which shall be entered all civil causes admitted to hearing before a Bench, in the order in which they are admitted. This will not, however, include Full Bench causes, which are heard, as laid down in Rule 4, on Fridays only. Should any cause be struck out of the Cause Book for any reason, as, e.g., the failure to deposit the amount required for printing, it will not, if subsequently re-admitted, be restored to its original place in the book, but will be entered at the bottom of the list on the date of its re-admission.

Cause lists for Civil Bench causes.

A separate book, to be called the Register of Postponed Civil Bench Causes, will be maintained by the Deputy Registrar, and he will enter in it all cases that are postponed, in the order in which they are postponed.

Another separate book, to be known as the Register of Remand Cases, will be maintained by the Deputy Registrar, and will contain all cases in which a remand has been ordered. Ordinarily in remand cases a date will be fixed for hearing at the time of entry in the register, such date to be a Monday in a week of the month following that by which a return to the order of remand is to be made.

A fourth book will be maintained by the Deputy Registrar for early cases, in which will be entered cases which have been marked by a Judge for an early date, and cases which according to practice are treated as such.

Weekly and daily cause lists will be prepared from these four registers in the following manner:—

At the end of each month the Deputy Registrar will prepare weekly cause lists for the four or five weeks of the third month ahead. Thus at the end of January he will prepare cause lists for the weeks of April. In preparing his cause lists for any month, he will first take the Register of Postponed Cases, and will put down first such cases from that register as will be ready for hearing by, or as may have been fixed for, that time. He will next similarly take cases from his Remand Register, in which a return to the remand has been received; then from his Register of Early Cases, and finally from the General Cause Register. In fixing the number of cases for the whole month, he will first calculate the number of Civil Benches to be held during the month, and will allow three cases per Bench sitting, making up the number from his four registers as already described.

In dividing the cases among the several weeks of the month, he will put down one-third of this number for the first week, a little less than one-third for the second, a fourth for the third, and the remainder for the fourth. Every case set down for any week will be set down as for hearing on the first working day of the week. There is one further point to be considered by the Deputy Registrar when fixing the number of cases for the month. It may be that by the end of the month then closing the Court has not kept up with the cause lists for that month, so that in all probability it will be by a similar amount in arrears at the end of the second month thereafter. In that case the Deputy Registrar will diminish by so much the number of cases to be set down for the third month ahead. Thus, if at the end of January the work is 20 cases in arrears, in arranging the cause lists for April, the Deputy Registrar will presume that there will be 20 cases over from March, and consequently will take 20 less cases from his registers, and will enter 20 less on the cause list for the first week of April.

In special cases it may be that a fixed date is given in a case. This may happen in several ways, as, *e.g.*, a Judge may, for some particular reason, give a date, or, owing to the difficulties of service of summons, the ordinary period of between two and three months is insufficient. In such cases the Deputy Registrar will make a note of the date fixed, which should, if possible, be the first working day of some week, and this case will take precedence of other work on that date, and will so far interrupt the working of the regular system. In arranging his weekly and daily cause lists the Deputy Registrar will allow for such cases.

As soon as a date is fixed, whether in the ordinary way, from two to three months ahead, or by the special order of a Judge, or the Registrar or Deputy Registrar, the Deputy Registrar will issue notice to the parties accordingly.

At the time when a cause is first admitted to a Bench no date of hearing will be fixed, but the parties will receive a notice, in writing, informing them that the cause has been so admitted, and that they will receive at least two months' notice of the date of hearing when such date is fixed.

(ii). On the Thursday of each week a daily cause list for the ensuing week

Daily cause list for Bench shall be prepared by the Deputy Registrar from the cases, when and how to be weekly cause list, in accordance with the following prepared. directions:—

(a) all cases shown in the weekly cause list which, owing to non-service of process or other cause, are not complete for hearing shall be omitted from the daily cause list;

(b) the cases which are complete for hearing will be set down so as to allow six cases for each of the first two Bench sittings, the remainder being divided, as nearly as may be, equally among the remaining days;

(c) the cases set down for hearing before the First, Second, or a Full Bench, respectively, shall be grouped separately;

(d) the cases shall be entered in the order in which they should be heard, with reference to the weekly cause list and the practice of the Court.

(iii). Subject to Rule 7 and the proviso to clause (v) of this rule, cases in the daily cause list will be liable to be called on for hearing, by the Bench to which they are allotted, on any Court day of the week.

Cases may be called on on any day of the week.

Cases to be called up for hearing in their order on the cause list.

(iv). Cases omitted from the daily cause list under sub-clause (a), clause (ii), of this rule shall be entered in the Register of Postponed Cases.

(v). Parties and their advocates, pleaders, mukhtars or agents are required to attend the Court on the day for which their cases are put down, and on subsequent days until their cases have been heard. are disposed of :

Provided that, when an advocate or pleader has been retained in any case in such list, if he informs the Deputy Registrar of the fact before 4 o'clock in the afternoon on the Wednesday of the preceding week (but not otherwise), the Deputy Registrar shall enter the name of such advocate or pleader opposite the case, and such case shall not be called on for hearing on any day prior to the day on which such case has been set down in such daily cause list.

(vi). In preparing the daily cause list the Deputy Registrar will take into consideration the number of cases, if any, likely to remain over from the week then closing, and will enter these first in the daily cause list for the ensuing week. Cases remaining over from the week closing to be entered first in the daily list for the week ensuing.

If these cases, together with the cases, already fixed for the week, exceed an average of five cases per Bench sitting, the surplus will not be entered on that week's daily cause lists, but will remain over for the week following.

CIRCULAR MEMO. No. 4—2662 G. of 1898.

To

ALL DISTRICT MAGISTRATES AND DISTRICT JUDGES IN THE PUNJAB.

Dated 16th June 1898.

ATTENTION is drawn to the delays which take place in effecting the service of notices issued by this Court in the exercise of its civil and criminal jurisdiction. As such delays cause great inconvenience, it is requested that such steps as may be necessary be taken to ensure a prompt return of the notices duly served in the manner directed by Law and the Rules and Orders of this Court.

SUBJECT.

Delays in effecting service of notices issued by the Chief Court.

CIRCULAR MEMO. No. 5—2414 G. of 1898.

To

ALL CRIMINAL COURTS IN THE PUNJAB.

Dated 24th June 1898.

SUBJECT.

Sessions Judges and Magistrates directed to acquaint themselves with the provisions of the new Code of Criminal Procedure.

SESSIONS Judges and Magistrates are reminded that the new Code of Criminal Procedure will come into force on the 1st July 1898, and they are requested to carefully study it, note the changes introduced by it, and conform to it in their proceedings.

CORRECTION SLIPS.

No. 109.

Dated 12th August 1898.

After the explanation to the proviso to clause (vi) of Rule II of No. XXVII, Rules and Orders, page 154, add the following note:—

Officers who have been merely officiating as Extra Assistant Commissioners are not admissible under this rule. It refers to officers who held the appointment substantively.

No. 110.

Dated 12th August 1898.

Add the following note to clause (iii) of Rule III of No. XXVII, Rules and Orders, page 155, as corrected by Correction Slip No. 8, dated the 8th July 1895:—

Officers who have been merely officiating as Tahsildars, Munsifs, or Registrars of Small Cause Courts are not admissible under this rule. It refers to officers who held the appointments specified substantively.

GENERAL LETTER No. 3028 G. of 1898.

To

ALL JUDICIAL OFFICERS IN THE PUNJAB.

Dated 13th August 1898.

THE Resident in Kashmir having again brought to the notice of the Judges that the instructions conveyed in the Court's Circular Memo. No. 4-784 G., dated the 17th February 1894, directing that a period of at least six weeks should be allowed for the return of summonses sent for service on persons resident in Kashmir, are not always complied with, the attention of all Judicial Officers is invited to this office General Letter No. 3977 G., dated the 28th November 1895, with the request that the instructions on the subject may be carefully observed in future.

Copy of a letter, No. 79, dated the 16th May 1896, from the Divisional Judge, Delhi Division, to the Registrar, Chief Court, Punjab.

FROM an inspection report of the Gurgaon District, it appears that litigants are now required in that district to stamp copies or transliterations of accounts filed under Section 62 of the Civil Procedure Code. As I have doubts whether such should be stamped,—and in any case the practice should be uniform throughout the Punjab,—I beg to refer the matter for the orders of the Judges.

Copy of a letter, No. 80, dated the 16th May 1896, from the Divisional Judge, Delhi Division, to the Registrar, Chief Court, Punjab.

I HAVE the honour to bring to your notice that in one district at least in this Division the statement attached to a plaint, giving particulars of land sued for, in Civil Form No. 320 (new series), is required to be stamped. It appears to me that there is no authority for requiring the same to be stamped, and as in any case it is desirable that the practice should be uniform in the Punjab, I beg to refer the matter for the orders of the Judges.

Copy of a letter, No. 1853 G., dated the 22nd May 1896, from the Registrar, Chief Court, Punjab, to the Divisional Judge, Delhi Division.

WITH reference to your letters Nos. 79 and 80, dated the 16th May 1896, in which you inquire whether the documents marginally noted should be stamped, I am desired to state that the Judges do not consider that any of the documents in question should be stamped,

1. Copies or translations of accounts filed under Section 62 of the Civil Procedure Code.
2. Statement attached to a plaint, giving particulars of land sued for (Civil Form No. 320).

No. 3146 G. of 1898.

Dated 18th August 1898.

COPIES of the foregoing forwarded to all Judicial Officers in the Punjab, for information and guidance.

CIRCULAR MEMO. No. 6—3354 G. of 1898.

To

ALL CIVIL COURTS IN THE PUNJAB.

Dated 6th September 1898.

It having been brought to the notice of the Judges that inconvenience results from the submission of applications in Vernacular for documents in the Civil Secretariat of the Punjab Government, required for inspection in connection with the disposal of pending cases, they direct that such calls

SUBJECT.

Calls for documents in the Punjab Civil Secretariat to be written in English, contain full particulars of papers required, and the purpose for which their inspection is necessary, and to be addressed to Assistant Secretary to Government, Punjab, General Branch.

for documents should in future—

- (1) be written in English ;
- (2) contain as accurate a description as possible of the documents wanted, and of the purpose for which they are required ; and
- (3) be addressed to the Assistant Secretary to Government, Punjab, General Branch.

CIRCULAR MEMO. No. 7—3454 G. of 1898.

To

ALL HEADS OF JUDICIAL OFFICES IN THE PUNJAB.

Dated 10th September 1898.

As considerable inconvenience arises in consequence of letters addressed to this office not being docketed in the office from which they are sent, the attention of Heads of Judicial Offices is invited to the instructions contained in Section VII of Circular Orders, Volume III, and to the orders of Government (circulated in pamphlet form) referred to in paragraph 2 of the same section, regarding the routine and procedure to be observed in the submission of correspondence, and especially in the matter of docketing of letters, and they are requested to see that these directions are carefully complied with in future.

SUBJECT.

Attention drawn to the orders relating to the conduct of official correspondence, and especially to the docketing of letters.

of correspondence, and especially in the matter of docketing of letters, and they are requested to see that these directions are carefully complied with in future.

GENERAL LETTER No. 3522 G. of 1898.

To

ALL SESSIONS JUDGES AND DISTRICT MAGISTRATES IN THE PUNJAB.

Dated 16th September 1898.

I AM desired to forward, for information and compliance, copy of a letter, No. 2638 G. I., dated the 9th September 1898, from the Inspector-General of Prisons, Punjab, together with a copy of its enclosures, with the request that in cases in which men convicted in the same case, or who have been associated in crime, are sentenced to transportation, a note of the fact may be made in column 7 of the Nominal Roll, full particulars for the preparation of which will be found in Section XXXIV, Circular Orders, Volume III, page 142.

Copy of a letter, No. 2638 G. I., dated the 9th September 1898, from the Inspector-General of Prisons, Punjab, to the Registrar, Chief Court, Punjab.

I HAVE the honour, with reference to Chief Court Book Circular No. VII—4379 G., dated the 26th October 1891, to forward copy of a letter, No. 9 ^{Port Blair}₈₄₆, dated the 5th October 1896, and enclosures, from the Under Secretary to the Government of India, Home Department, to the Chief Secretary to the Government of the Punjab, and to request that you will be so good as to move the Judges of the Chief Court to instruct Sessions Judges and District Magistrates to make the needful notes on the Nominal Rolls of offenders sentenced in the same case, or who have been associated in crime, in order that the authorities at Port Blair may be duly apprised of the fact, and so enabled to avoid complications that have arisen in the past from the want of such knowledge.

Copy of a letter, No. 9, ^{Port Blair}₈₄₆, dated Simla, the 5th October 1896, from C. H. A. Hill, Esquire, Under Secretary to the Government of India, to the Chief Secretary to the Government of the Punjab.

1 AM directed to forward extract (paragraph 11) from a letter* from the Superintendent, Port Blair, and to request that in cases in which men convicted in the same case, or who have been associated in crime, are sent to Port Blair on different dates, the Superintendent of Port Blair may, with the permission of His Honor the Lieutenant-Governor, be apprised of the fact at the earliest date possible.

2. I am to explain that unless such intimation is given to the Superintendent, the fact that convicts have had any connection with one another previous to deportation must, almost inevitably, escape notice at the Settlement. Grave complications have arisen in the past owing to convicts associated in crime not having been kept apart during their stay in the Settlement, and the present instructions are issued in order to avoid the recurrence of such difficulties in future.

Endorsement by the Government of India, dated the 5th October 1896.

COPY forwarded to the Superintendent, Port Blair, for information, with reference to paragraph 11 of his letter No. 968, dated the 17th August 1896.

Extract (paragraph 11) from a letter from the Superintendent of Port Blair, No. 968, dated the 17th August 1896.

11. I ATTACH copies of the orders* I have issued on the subject of the segregation of connected convicts for information, together with a circular* on the subject, which will explain what can be done locally in the matter of segregation, and will also tend to show the complicated nature of the question. But I would point out that unless intimation of their connection is sent with them from India when convicts who are convicted in the same case, or series of cases, are sent to Port Blair at different dates, the fact of the connection is almost certain to escape detection unless accidentally revealed. It will not, on the other hand, I think, be difficult for the Jail authorities, under Local Governments in India, to intimate the fact when sending a convict to Port Blair that he is connected in his case, or cases, with certain other convicts already forwarded. Such information would be certain of effect, and I would suggest that the Local Governments in India be requested to direct that it be sent.

Endorsement No. 373, dated Lahore, the 23rd October 1896, by the Junior Secretary to the Government of the Punjab.

COPY forwarded to the Inspector-General of Prisons, Punjab, for information and necessary action.

CORRECTION SLIPS.

No. 111.

Dated 16th September 1898.

On page 143, Circular Orders, Section XXXIV, after paragraph 4, add the following:—

5. The instructions contained in the annexed copy of Government of India letter, No. ⁹₈₄₆, Port Blair, dated the 5th October 1896 (^{Home Department}_{Port Blair}), together

with its enclosure, requiring that in cases in which men convicted in the same case, or who have been associated in crime, are sentenced to transportation, the Superintendent of Port Blair may be apprised of the fact as soon as possible, is published for information and guidance of all Sessions Judges and District Magistrates. The information required should be noted in column 7 of the Nominal Roll.

Copy of a letter, No. 9, ⁸⁴⁶Port Blair, dated Simla, the 5th October 1896, from C. H. A. Hill, Esquire, Under Secretary to the Government of India, to the Chief Secretary to the Government of the Punjab.

I AM directed to forward extract (paragraph 11) from a letter, No. 968, dated 17th August 1896, from the Superintendent, Port Blair, and to request that in cases in which men convicted in the same case, or who have been associated in crime, are sent to Port Blair on different dates, the Superintendent of Port Blair may, with the permission of His Honor the Lieutenant-Governor, be apprised of the fact at the earliest date possible.

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Endorsement No. 373, dated Lahore, the 23rd October 1896, by the Junior Secretary to the Government of the Punjab.

Copy forwarded to the Inspector-General of Prisons, Punjab, for information and necessary action.

No. 112.

Dated the 27th September 1898.

On page 383, Circular Orders, Volume III, Appendix VI, add the following note under the forms of Registers Nos. XIV and XIV A :—

The maintenance of these two Registers is not necessary in the case of lock-ups attached to Jails.

CIRCULAR MEMO. No. 8—3867 G. of 1898.

To

ALL JUDICIAL OFFICERS IN THE PUNJAB.

Dated 12th October 1898.

THE Judges have observed that in some districts of the Province a

SUBJECT.

Notarial stamp of Re. 1 not to be affixed to powers-of-attorney in civil and criminal cases in addition to the Court-fee stamp.

Notarial stamp of one rupee is caused to be affixed to powers-of-attorney in civil and criminal cases in addition to the Court-fee stamp.

As the practice is quite unauthorized, the Judges direct that only the stamp duty as laid down in the Court Fees Act be levied in future.

CORRECTION SLIP No. 113.

Dated 20th October 1898.

On page 175, "Instructions to Judicial Officers," Section XXXIV, clause 6 of paragraph 2, as amended by Correction Slips Nos. 44 and 64, dated the 2nd March 1896 and 22nd February 1897, respectively, *after* the words "in the Rawalpindi District" *add* "and, in the absence of the Civil Surgeon from head-quarters, the Hospital Assistant in charge of the Dera Ghazi Khan Dispensary."

CIRCULAR MEMO. No. 9—4131 G. of 1898.

To

ALL DIVISIONAL JUDGES IN THE PUNJAB.

Dated 4th November 1898.

RECOMMENDATIONS are sometimes received for the promotion of petition-

SUBJECT.

Petition-writers to have at least one year's experience in the 2nd grade before being recommended for the 1st grade.

writers from the 2nd to the 1st grade after a very few months' practice. It appears to the Judges desirable that a petition-writer should have at least a year's experience before he is recommended for a first grade license, and they are accordingly pleased to direct that for the future this should be observed in making such recommendations.

CIRCULAR MEMO. No. 10—4198 G. of 1898.

To

ALL SESSIONS JUDGES AND DISTRICT MAGISTRATES IN THE PUNJAB.

Dated 9th November 1898.

CASES having been brought to the notice of the Judges in which Post Office

SUBJECT.

Prosecutions of Post Office peons to be undertaken after consultation with Postal Superintendent of Division concerned.

employés have been prosecuted without the knowledge of the Postal Authorities, they direct that, in future, such prosecutions should be undertaken after consultation with the Postal Superintendent of the Division in which the alleged offence is said

to have been committed, and that this officer should be informed of all complaints instituted by private persons.

CIRCULAR MEMO. No. 11—4364 G. of 1898.

To

ALL SUBORDINATE COURTS IN THE PUNJAB.

Dated 23rd November 1898.

THE Judges desire to call the attention of all Courts to the rules regarding the supply of copies contained in Section XXIII of Rules and Orders, Volume I, of the Chief Court Circulars, and especially to Rules X, XI, XVIII and XIX. Copies, and especially English copies, are, with few exceptions, badly and carelessly written, frequently by persons who can only have a slight acquaintance with English, and are carelessly compared with the originals.

SUBJECT.

Attention drawn to Rules X, XI, XVIII and XIX of Section XXIII, Rules and Orders, Volume I, regarding supply of copies.

Only men who write a good and clear hand and understand the meaning of what they write should be employed in the work of copying, and the officials whose duty it is to examine copies should be warned to pass none that are badly written, and to themselves properly compare the copies with the originals and test their correctness.

CORRECTION SLIPS.

Dated 1st December 1898.

No. 114.

Add the following as a foot-note to Rule X (i) of Section XXXV, Circular Orders, Volume III, page 149 :—

The proportion of the different ingredients for one day's rations of condiments for eight prisoners should be :—

Coriander	...	...	...	...	...	...	...	3/16	Chittacks.
Garlic	...	...	...	...	...	...	...	6/16	"
Turmeric	...	...	...	...	...	...	...	4/16	"
Chillies	...	...	...	...	...	...	...	8/16	"

Dated 10th December 1898.

No. 115.

On page 138, "Instructions to Judicial Officers," Section XXVII, in paragraph 68, for the words "Section 560, which replaces * * * competent to try" substitute as follows :—

"The compensation can only be awarded in cases triable by a Magistrate and instituted by complaint, or upon information to a Police Officer or Magistrate (Section 250, Criminal Procedure Code.)"

No. 116.

"Instructions to Judicial Officers," Section XLVI, on page 247, in paragraph 1, omit the words from "It should be noted" to the end.

No. 117.

In Section LVI of "Instructions to Judicial Officers," for "Act V of 1876" substitute "Act VIII of 1897," and add a new paragraph as follows :—

"2. It should be noted that the Criminal Procedure Code of 1898, Section 562, gives power to certain Magistrates to release upon probation of good conduct persons convicted of certain minor offences.

The youth of an offender would often constitute an extenuating circumstance which would justify action under this section."

CIRCULAR MEMO. No. 12-4639 G. OF 1898.

To

ALL JUDICIAL OFFICERS IN THE PUNJAB.

Dated 14th December 1898.

SUBJECT.

Notarial stamp of Re. 1 not to be affixed to powers-of-attorney in civil and criminal cases in addition to the Court-fee stamp.

THE following Circular is issued, for information and guidance, in supersession of Circular Memo. No. 8-3867 G., dated the 12th October 1898:—

THE Judges have observed that in some districts of the Province a notarial stamp of one rupee is caused by presiding officers to be affixed to powers-of-attorney produced by attorneys appearing in civil and criminal cases in their Courts for attestation in addition to the Court-fee stamp.

As the practice is quite unauthorized, the Judges direct that no extra fee be levied for attestation by the Court in which the power-of-attorney is to be used.

CORRECTION SLIPS.

Dated 15th December 1898.

No. 118.

For Section LXIV of the Court's "Instructions to Judicial Officers" substitute the following:—

"The attention of all Divisional Judges and Deputy Commissioners is directed to the provisions of Section 36 of Act XVIII of 1879 (Legal Practitioners Act) as amended by Act XI of 1896.

It is very desirable that use should be made of this section, as it enables Courts to protect suitors and respectable members of the Bar, at least to the extent of stopping touting within the precincts of the Courts.

The section only requires that the Court preparing a list of touts should satisfy itself that persons habitually act as touts, and should give them an opportunity of showing cause against the inclusion of their names.

A wide discretion is left to the Court as to the method in which it may so satisfy itself."

Dated 19th December 1898.

No. 119.

Add the following note to Rule XLIII of No. V, Rules and Orders, Volume I, page 27:—

The application should be submitted by all Civil Courts direct to the Collector. Applications of Courts below that of the District Judge should be submitted in Vernacular. District Judges' applications should be sent in English.

Dated 23rd December 1898.

No. 120.

In substitution of clause 6 of paragraph 2 of the Notification published at page 175, "Instructions to Judicial Officers," Volume II, and in supersession of Correction Slips Nos. 44, 64 and 113, dated, respectively, the 2nd March 1896, 22nd February 1897 and 20th October 1898, read the following:—

(6) The Hospital Assistants attached to the following dispensaries, viz.:—

Teri and Hangu in the Kohat District;

Mianwali, Isa Khel and Kalabagh in the Bannu District;

Leiah, Tank and Kulachi in the Dera Ismail Khan District;

Rojhan and Rajanpur, and, in the absence of the Civil Surgeon from headquarters, Dera Ghazi Khan in the Dera Ghazi Khan District;

Murree in the Rawalpindi District (in the absence of the Civil Surgeon during the winter months).

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TO

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(SUPREME GOVERNMENT) 1898.

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**LEGISLATIVE DEPARTMENTAL
ORDERS
(SUPREME GOVERNMENT), 1898.**

LEGISLATIVE DEPARTMENT (SUPREME GOVERNMENT).

(Passed on the 21st January 1898).

ACT No. I OF 1898.

An Act to amend the Stage-Carriages Act, 1861.

WHEREAS it is expedient to amend the Stage-Carriages Act, XVI of 1861 ;
It is hereby enacted as follows :—

Short title.

1. This Act may be called the Stage-Carriages Act (1861) Amendment Act, 1898.

Repeal of proviso to Section 1, Act XVI, 1861, and of Section 2, Act XVI, 1876.

2. The proviso to Section 1 of the Stage-Carriages Act, XVI of 1861, and Section 2 of the Stage-Carriages Act (1861) Amendment Act, XVI of 1876, are hereby repealed.

Substitution of new paragraph in Section 4, Act XVI, 1861.

3. The first paragraph of Section 4 of the Stage-Carriages Act, XVI of 1861, is hereby repealed, and the following paragraph is substituted therefor, namely :—

“ For every such license there shall be paid by the proprietor of the stage-carriage the sum of five rupees or such less sum as the Local Government may fix, and such license shall be in force for one year from the date thereof.”

Addition of new section after Section 20, Act XVI, 1861.

4. After Section 20 of the said Act the following section shall be added, namely :—

“ 20A. (1) The Local Government may, by notification in the official gazette, make rules to carry out the purposes and objects of this Act in the territories under its administration or any part of the said territories.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may—

(a) prescribe forms for licenses under this Act, the sums payable for the same and the conditions on which they may be granted, and the cases in which they may be revoked ;

(b) provide for the inspection of stage-carriages, and of the animals employed in drawing them ; and

(c) regulate the number and length of the stages for which animals may be driven in stage-carriages, and the manner in which they shall be harnessed and yoked.

(3) In making any rule under this section the Local Government may direct that a breach thereof shall be punishable with fine which may extend to one hundred rupees.”

Addition of sections after Section 21, Act XVI, 1861.

5. After Section 21 of the said Act the following sections shall be added, namely :—

"22. This Act, as amended by subsequent Acts, extends to the whole of British India; but it shall not apply to carriages ordinarily plying for hire within the limits of any municipality or cantonment or other place in which any law for the regulation of carriages is for the time being in force.

23. The Local Government may, by notification in the official gazette, exempt any carriages or class of carriages from all or any of the provisions of this Act."

(Passed on the 21st January 1898).

ACT No. II OF 1898.

An Act to provide for the issue of currency notes on the security of gold received in England.

WHEREAS it is expedient to provide for the issue of currency notes on the security of gold received in England; It is hereby enacted as follows:—

Short title, commencement and duration. 1. (1) This Act may be called the Indian Paper Currency Act, 1898.

(2) It shall come into force at once; and

(3) It shall remain in force for six months from its commencement, and no longer.

Addition of new section after Section 13, Act XX of 1882. 2. After Section 13 of the Indian Paper Currency Act, XX of 1882, the following section shall be added, namely:—

"13A. The Governor General in Council may, from time to time, by an order notified in the *Gazette of India*, direct that currency notes shall be issued at such offices of issue as are named in the order to an amount equal to the value of gold held by the Secretary of State for India at the rate, and subject to the conditions, fixed by that order:

Provided that—

(1) the power conferred by this section shall not be exercised unless the Secretary of State for India shall consent to hold in gold coin or gold bullion what he shall determine to be equivalent in value to the notes so issued, as a reserve to secure the payment of such notes, until he shall transmit the same, or what he shall determine to be equivalent to the same, in gold coin or gold bullion to India, or until the Government of India shall appropriate and set apart in India, as a part of the currency reserve under Section 19, an amount of coin of the Government of India equal in value to such notes;

(2) gold coin or gold bullion so remitted shall be deemed to be received, within the meaning of Section 19, when it is received in India by the Governor-General in Council; and

(3) gold coin or gold bullion so retained shall, until its arrival in India, be distinguished from other gold coin or gold bullion in the abstract account published under Section 27."

(Passed on the 4th February 1898).

ACT No. III of 1898.

An Act to provide for the segregation and medical treatment of pauper lepers and the control of lepers following certain callings.

WHEREAS it is expedient to provide for the segregation and medical treatment of pauper lepers and the control of lepers following certain callings; It is hereby enacted as follows:—

Title, extent and commencement. 1898. 1. (1) This Act may be called the Lepers Act. (2) It extends to the whole of British India, inclusive of Upper Burma, British Baluchistan, the Santal Parganas and the Pargana of Spiti; but

(3) It shall not come into force in any part thereof until the Local Government, as hereinafter provided, has declared it applicable thereto.

(4) The Local Government may, by notification in the official gazette, apply this Act or any part thereof to the whole or any portion of the territories for the time being under its administration, and may in like manner amend or cancel any such notification.

Definitions. 2. In this Act, unless there is anything repugnant in the subject or context,—

(1) “leper” means any person suffering from any variety of leprosy in whom the process of ulceration has commenced;

(2) “pauper leper” means a leper—

(a) who publicly solicits alms or exposes or exhibits any sores, wounds, bodily ailment or deformity with the object of exciting charity or of obtaining alms, or

(b) who is at large without any ostensible means of subsistence;

(3) “leper asylum” means a leper asylum appointed under Section 3;

(4) “Board” means a Board constituted under Section 5; and

(5) “District Magistrate” includes a Chief Presidency Magistrate.

3. The Local Government may, by notification in the official gazette, appoint any place to be a leper asylum for the purposes of this Act and specify the local areas from which lepers may be sent to such asylum, and may, in like manner, alter or cancel any such notification.

4. Subject to any rules which may be made under Section 16, the Local Government may appoint any Medical Officer of the Government or other qualified medical man to be an Inspector of Lepers and any person to be a Superintendent of a Leper Asylum, with such establishment as may, in its opinion, be necessary, and every Inspector or Superintendent so appointed shall be deemed to be a public servant.

5. The Local Government shall constitute for every leper asylum appointed under Section 3 a Board consisting of not less than three members, one of whom at least shall be a Medical Officer of the Government.

6. (1) Within any local area which has been specified under Section 3 any police-officer may arrest without a warrant any person who appears to him to be a pauper leper.

(2) Such police-officer shall forthwith take or send the person so arrested to the nearest convenient police-station.

7. Every person brought to a police-station under the last foregoing section shall, without unnecessary delay, be taken before an Inspector of Lepers, who,—

(a) if he finds that such person is not a leper within the meaning of Section 2, shall give him a certificate in Form A set forth in the schedule, whereupon such person shall be forthwith released from arrest;

(b) if he finds that such person is a leper within the meaning of Section 2, shall give to the police-officer, in whose custody the leper is, a certificate in Form B set forth in the schedule, whereupon the leper shall, without unnecessary delay, be taken before a Magistrate having jurisdiction under this Act.

8. (1) If it appears to any Presidency Magistrate or Magistrate of the first class or to any other Magistrate authorised in this behalf by the Local Government, upon the certificate in Form B set forth in the schedule, that any person is a leper, and if it further appears to the Magistrate that the person is a pauper leper, he may, after recording the evidence on the above-mentioned points, and his order thereon, send the pauper leper in charge of a police-officer, together with an order in Form C set forth in the schedule, to a leper asylum, where such leper shall be detained until discharged by order of the Board or the District Magistrate:

Provided that, if the person denies the allegation of leprosy, the Magistrate shall call and examine the Inspector of Lepers, and shall take such further evidence as may be necessary to support or to rebut the allegation that the person is a leper, and may for this purpose adjourn the enquiry from time to time, remanding the person for observation or for other reason to such place as may be convenient, or admitting him to bail:

Provided also that if any friend or relative of any person found to be a pauper leper shall undertake in writing to the satisfaction of the Magistrate that such pauper leper shall be properly taken care of and shall be prevented from publicly begging in any area specified under Section 3, the Magistrate, instead of sending the leper to an asylum, may make the leper over to the care of such friend or relative, requiring him, if he thinks fit, to enter into a bond with one or more sureties, to which the provisions of Section 514 of the Code of Criminal Procedure, X of 1882, shall be applicable.

(2) If the Magistrate finds that such person is not a leper, or that, if a leper, he is not a pauper leper, he shall forthwith discharge him.

9. (1) The Local Government may, by notification in the official gazette, order that no leper shall, within any area specified under Section 3,—

(a) personally prepare for sale or sell any article of food or drink or any drugs or clothing intended for human use; or

(b) bathe, wash clothes or take water from any public well or tank debarred by any municipal or local bye-law from use by lepers; or

(c) drive, conduct or ride in any public carriage plying for hire other than a railway carriage ; or

(d) exercise any trade or calling which may, by such notification, be prohibited to lepers.

(2) Any such notification may comprise all or any of the above prohibitions.

(3) Whoever disobeys any order made pursuant to the powers conferred by this section shall be punishable with fine which may extend to twenty rupees :

Provided that, when any person is accused of an offence under this section, the Magistrate before whom he is accused shall cause him to be examined by an Inspector of Lepers, and shall not proceed with the case unless such Inspector furnishes a certificate, in Form B set forth in the schedule, in respect of such person.

10. (1) Whenever any leper who has been convicted of an offence punishable under the last foregoing section is again convicted of any offence punishable under that section, the Magistrate may, in addition to, or in lieu of, any punishment to which such leper may be liable, require him to enter into a bond, with one or more sureties, binding him to depart forthwith from the local area specified under Section 3 in which he is and not to enter that or any other local area so specified until an Inspector of Lepers shall have given him a certificate in Form A set forth in the schedule.

(2) If any such leper fails to furnish any security required under subsection (1), the Magistrate may send him in charge of a police-officer, with an order in Form D set forth in the schedule, to a leper asylum, where such leper shall be detained until discharged by order of the Board or the District Magistrate.

(3) The powers conferred by this section shall only be exercised by a Presidency Magistrate or Magistrate of the first class.

11. Any person who, within any area specified under Section 3, knowingly employs a leper in any trade or calling prohibited by order under Section 9 shall be punishable with fine which may extend to fifty rupees :

Provided that the alleged leper shall be produced before the Magistrate, and the Magistrate shall cause him to be examined by an Inspector of Lepers, and shall not proceed with the case unless such Inspector furnishes a certificate in Form B set forth in the schedule in respect of such alleged leper.

12. Whoever, having been sent to a leper asylum under an order of a Magistrate in Form C or Form D set forth in the schedule, escapes from, or leaves, the asylum without the permission in writing of the Superintendent thereof, may be arrested by any police-officer without a warrant, and upon arrest shall be forthwith taken back to the leper asylum.

13. Two or more members of the Board, one of whom shall be the Medical Officer, shall, once at least in every three months, together inspect the leper asylum for which they are constituted, and see and examine (a) every leper therein admitted since the last

inspection, together with the order for his admission, and (b), as far as circumstances will permit, every other leper therein, and shall enter in a book to be kept for the purpose any remarks which they may deem proper in regard to the management and condition of the asylum and the lepers therein.

14. Any two members of the Board, one of whom shall be the Medical Officer, may at any time by an order in writing in Form E set forth in the schedule and signed by them, direct the discharge from the leper asylum of any leper detained therein under the provisions of this Act.

15. Any person, other than a pauper leper, in respect of whom an Inspector of Lepers has issued a certificate, in Form B set forth in the schedule, declaring him to be a leper, or has refused to issue a certificate in Form A set forth in the schedule, may appeal against the issue or refusal of any such certificate to such officer as may be appointed by the Local Government in this behalf, and the decision of such officer shall be final.

16. The Local Government may, by notification in the official gazette, make rules generally for carrying out the purposes of this Act, and in particular—

- (a) for the guidance of all or any of the officers discharging any duty under this Act; and
- (b) for the management of, and the maintenance of discipline in, a leper asylum.

17. Notwithstanding any thing in any enactment with respect to the purposes to which the funds or other property of a local authority may be applied, any local authority may—

- (a) establish or maintain, or establish and maintain, or contribute towards the cost of the establishment or maintenance or the establishment and maintenance of, a leper asylum either within or without the local limits of such local authority;
- (b) with the previous sanction of the Local Government and subject to such conditions as that Government may prescribe, appropriate any immovable property vested in or under the control of, such body, as a site for, or for use as, a leper asylum.

18. No suit, prosecution or other legal proceeding shall lie against any officer or person in respect of anything in good faith done or intended to be done under, or in pursuance of, the provisions of this Act.

19. When any part of this Act has been applied under sub-section (4) of Section I to the whole or any portion of the territories administered by the Lieutenant-Governor of Bengal, the Lieutenant-Governor may, by notification in the official gazette, direct that the whole or any part of the Lepers Act, Bengal Act V of 1895, shall, except as regards anything done or any offence committed or any fine or penalty incurred or any proceedings commenced, cease to have effect in the portion of the said territories to which this Act has been so applied.

SCHEDULE.

A.—CERTIFICATE.

(Section 7).

I, the undersigned (*here enter name and official designation*), hereby certify that I on the _____ day of _____ at _____ personally examined (*here enter name of person examined*) and that the said _____ is not a leper as defined by the Lepers Act, 1898.

Given under my hand this _____ day of 189 .

(Signature).

Inspector of Lepers.

B.—CERTIFICATE.

(Section 7).

I, the undersigned (*here enter name and official designation*), hereby certify that I on the _____ day of _____ at _____ personally examined (*here enter name of leper*), and that the said _____ is a leper as defined by the Lepers Act, 1898, and that I have formed this opinion on the following grounds, namely :—

(Here state the grounds).

Given under my hand this _____ day of 189 .

(Signature).

Inspector of Lepers.

C.—WARRANT OF DETENTION.

(Section 8).

To

THE SUPERINTENDENT OF THE LEPER ASYLUM AT

WHEREAS it has been made to appear to me that (*name and description*) is a pauper leper as defined in the Lepers Act, 1898 :

This is to authorise you, the said Superintendent, to receive the said _____ into your custody together with this order and ^{him}_{her} safely to keep in the said asylum until ^{he}_{she} shall be discharged by order of the Board or the District Magistrate.

Given under my hand and the seal of the Court this _____ day of 189 .

(Signature).

Magistrate.

SEAL

D.—WARRANT OF DETENTION.

(Section 10).

To

THE SUPERINTENDENT OF THE LEPER ASYLUM AT

WHEREAS (*name and description*) has this day been convicted by me of an offence punishable under Section 9 of the Lepers Act, 1898, and whereas it has been proved before me that the said (*name and description*) was previously convicted of an offence punishable under the same section :

This is to authorise you, the said Superintendent, to receive the said ^{him}_{her} into your custody together with this order safely to keep in the said asylum until ^{he}_{she} shall be discharged by order of the Board or the District Magistrate.

Given under my hand and the seal of the Court this
189 .

day of

(Signature).



Magistrate.

E.—ORDER OF DISCHARGE BY BOARD.*

(Section 14).

To

THE SUPERINTENDENT OF THE LEPER ASYLUM AT

WHEREAS (*name and description*) was committed to your custody under an order dated the day of 189 . and there have appeared to us sufficient grounds for the opinion that ^{he}_{she} can be released without hazard or inconvenience to the community :

This is to authorise and require you forthwith to discharge the said (*name*) from your custody.

Given under our hands this
189 .

day of

(Signatures).

Members of the Asylum Board.

(Passed on the 18th February 1898).

ACT No. IV of 1898.

An Act to amend the Indian Penal Code.

WHEREAS it is expedient to amend the Indian Penal Code ; It is hereby enacted as follows :—

Short title and com-
mencement.

1. (1) This Act may be called the Indian Penal Code (XLV of 1860) Amendment Act, 1898 ; and

(2) It shall come into force at once.

* A corresponding form may be used by the District Magistrate for orders of discharge issued under Section 10 (2).

Substitution of new section for Section 4, Act XLV, 1860. 2. Section 4 of the Indian Penal Code, XLV of 1860, is hereby repealed, and the following section is substituted therefor, namely :—

Extension of Code to extra-territorial offences. “4. The provisions of this Code apply also to any offence committed by—

- (1) any Native Indian subject of Her Majesty in any place without and beyond British India;
- (2) any other British subject within the territories of any Native Prince or Chief in India;
- (3) any servant of the Queen, whether a British subject or not, within the territories of any Native Prince or Chief in India.

Explanation.—In this section the word ‘offence’ includes every act committed outside British India which, if committed in British India, would be punishable under this Code.

Illustration.

(a) A, a coolie, who is a Native Indian subject, commits a murder in Uganda. He can be tried and convicted of murder in any place in British India in which he may be found.

(b) B, a European British subject, commits a murder in Kashmir. He can be tried and convicted of murder in any place in British India in which he may be found.

(c) C, a foreigner who is in the service of the Punjab Government, commits a murder in Jhind. He can be tried and convicted of murder at any place in British India in which he may be found.

(d) D, a British subject living in Indore, instigates E to commit a murder in Bombay, D is guilty of abetting murder.”

Abetment in British India of offences outside it.

3. After Section 108 of the Indian Penal Code, XLV of 1860, the following section shall be added, namely :—

“108A. A person abets an offence within the meaning of this Code who in British India abets the commission of any act without and beyond British India which would constitute an offence if committed in British India.

Abetment in British India of offences outside it.

Illustration.

A, in British India, instigates B, a foreigner in Goa, to commit a murder in Goa. A is guilty of abetting murder.”

Substitution of new section for Section 124A, Act XLV, 1860.

4. Section 124A of the Indian Penal Code, XLV of 1860, is hereby repealed, and the following section is substituted therefor, namely :—

“124A. Whoever by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards Her Majesty or the Government established by law in British India, shall be punished with transportation for life or any shorter term, to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.

Sedition.

Explanation 1.—The expression “disaffection” includes disloyalty and all feelings of enmity.

Explanation 2.—Comments expressing disapprobation of the measures of the Government with a view to obtain their alteration by lawful means, without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.

Explanation 3.—Comments expressing disapprobation of the administrative or other action of the Government without exciting or attempting to excite hatred, contempt or disaffection do not constitute an offence under this section.”

Addition of new section after Section 153, Act XLV, 1860.

5. After Section 153 of the Indian Penal Code, XLV of 1860, the following section shall be inserted, namely :—

“153A. Whoever by words, either spoken or written, or by signs, or by visible representations or otherwise, promotes or attempts to promote feelings of enmity or hatred between different classes of Her Majesty’s subjects shall be punished with imprisonment which may extend to two years, or with fine, or with both.

Promoting enmity between classes.

Explanation.—It does not amount to an offence within the meaning of this section to point out without malicious intention and with an honest view to their removal, matters which are producing, or have a tendency to produce, feelings of enmity or hatred between different classes of Her Majesty’s subjects.”

Substitution of new section for Section 505, Act XLV, 1860.

6. Section 505 of the Indian Penal Code, XLV of 1860, is hereby repealed and the following section is substituted therefor, namely :—

Statements conducing to public mischief.

“505. Whoever makes, publishes or circulates any statement, rumour or report,—

- (a) with intent to cause, or which is likely to cause, any officer, soldier or sailor in the Army or Navy of Her Majesty or in the Royal Indian Marine or in the Imperial Service Troops to mutiny or otherwise disregard or fail in his duty as such ; or
- (b) with intent to cause, or which is likely to cause, fear or alarm to the public, or to any section of the public, whereby any person may be induced to commit an offence against the State or against the public tranquillity ; or
- (c) with intent to incite, or which is likely to incite, any class or community of persons to commit any offence against any other class or community ;

shall be punished with imprisonment which may extend to two years, or with fine, or with both.

Exception.—It does not amount to an offence, within the meaning of this section, when the person making, publishing or circulating any such statement, rumour or report has reasonable grounds for believing that such statement, rumour or report is true and makes publishes or circulates it without any such intent as aforesaid.”

(Passed on the 22nd March 1898).

ACT No. V OF 1898.

The Criminal Procedure Code, 1898.

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An Act to consolidate and amend the law relating to Criminal Procedure.

WHEREAS it is expedient to consolidate and amend the law relating to Criminal Procedure; It is hereby enacted as follows:—

PART I.—PRELIMINARY.

CHAPTER I.

1. (1) This Act may be called the Code of Criminal Procedure, 1898; and it shall come into force on the first day of July 1898.

(2) It extends to the whole of British India; but, in the absence of any specific provision to the contrary, nothing herein contained shall affect any special or local law now in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force, or shall apply to—

(a) the Commissioners of Police in the towns of Calcutta, Madras and Bombay, or the police in the towns of Calcutta and Bombay;

(b) heads of villages in the Presidency of Fort St. George; or

(c) village police-officers in the Presidency of Bombay:

Provided that the Local Government may, if it thinks fit, with the sanction of the Governor-General in Council, by notification in the official Gazette, extend any of the provisions of this Code, with any necessary modifications, to such excepted persons.

2. (1) On and from the first day of July 1898, the enactments mentioned in the first schedule shall be repealed to the extent specified in the fourth column thereof, but not so as to restore any jurisdiction or form of procedure not then existing or followed, or to render unlawful the continuance of any confinement which is then lawful.

(2) All notifications published, proclamations issued, powers conferred, forms prescribed, local limits defined, sentences passed and orders, rules and appointments made, under any enactment hereby repealed, or under any enactment repealed by any such enactment, and which are in force immediately before the first day of July 1898, shall be deemed to have been respectively published, issued, conferred, prescribed, defined, passed and made under the corresponding section of this Code.

(3) The provisions of this Code shall apply to all proceedings instituted after the commencement of this Code, and, so far as may be, to all cases pending in any Criminal Court when this Code comes into force.

3. (1) In every enactment passed before this Code comes into force, in which reference is made to, or to any chapter or section of, the Code of Criminal Procedure, Act XXV of 1861 or Act X of 1872, or Act X of 1882, or to any other enactment hereby repealed, such reference shall, so far as may be practicable, be taken to be made to this Code or to its corresponding chapter or section.

(2) In every enactment passed before this Code comes into force the expressions in former Acts. expressions “Officer exercising (or ‘having’) the powers (or ‘the full powers’) of a Magistrate,” “Subordinate Magistrate, 1st class,” and “Subordinate Magistrate, second class,” shall respectively be deemed to mean “Magistrate of the first class,” “Magistrate of the second class” and “Magistrate of the third class,” the expression “Magistrate of a division of a district” shall be deemed to mean “Subdivisional Magistrate,” the expression “Magistrate of the district” shall be deemed to mean “District Magistrate,” the expression “Magistrate of Police” shall be deemed to mean “Presidency Magistrate,” and the expression “Joint Sessions Judge” shall mean “Additional Sessions Judge.”

4. (1) In this Code the following words and expressions have the following meanings, unless a different intention appears from the subject or context :—

(a) “Advocate General” includes also a Government Advocate, or, where there is no Advocate General or Government Advocate, such officer as the Local Government may, from time to time, appoint in this behalf:

(b) “bailable offence” means an offence shown as bailable in the second schedule, or which is made bailable by any other law for the time being in force; and “non-bailable offence” means any other offence:

(c) “charge” includes any head of charge when the charge contains more heads than one:

(d) “Chief Justice” includes also the Chief Judge of the Chief Court of the Punjab and the Recorder of Rangoon.

(e) “Clerk of the Crown” includes any officer specially appointed by the Chief Justice to discharge the functions given by this Code to the Clerk of the Crown:

(f) “cognizable offence” means an offence for, and “cognizable case” means a case in which a police-officer, within or without the presidency-towns, may, in accordance with the second schedule, or under any law for the time being in force, arrest without warrant:

“Commissioner of Police.” (g) “Commissioner of Police,” includes a Deputy Commissioner of Police:

(h) “complaint” means the allegation made orally or in writing to a Magistrate, with a view to his taking action, under this Code, that some person, whether known or unknown, has committed an offence, but it does not include the report of a police-officer:

“European British subject.”

(i) “European British subject” means—

- (i) any subject of Her Majesty born, naturalised or domiciled in the United Kingdom of Great Britain and Ireland or in any of the European, American or Australian Colonies or Possessions of Her Majesty, or in the Colony of New Zealand, or in the Colony of the Cape of Good Hope or Natal ;
- (ii) any child or grandchild of any such person by legitimate descent :
- (j) " High Court " means, in reference to proceedings against European British subjects or persons jointly charged with " High Court." European British subjects, the High Courts of Judicature at Fort William, Madras and Bombay, the High Court of Judicature for the North-Western Provinces, the Chief Court of the Punjab and the Court of the Recorder of Rangoon :
- in other cases " High Court " means the highest Court of criminal appeal or revision for any local area ; or, where no such Court is established under any law for the time being in force, such officer as the Governor-General in Council may appoint in this behalf :
- (k) " inquiry " includes every inquiry other than a trial conducted " Inquiry." under this Code by a Magistrate or Court :
- (l) " investigation " includes all the proceedings under this Code for the collection of evidence conducted by a police-officer or by any person (other than a Magistrate) " Investigation." who is authorised by a Magistrate in this behalf :
- (m) " judicial proceeding " includes any proceeding in the course of " Judicial proceeding." which evidence is or may be legally taken on oath :
- (n) " non-cognizable offence " means an offence for, and " non-cognizable case " means a case in, which a police-officer, within or without a presidency-town, " Non-cognizable offence." " Non-cognizable case." may not arrest without warrant :
- (o) " offence " means any act or omission made punishable by any law " Offence." for the time being in force ;
- it also includes any act in respect of which a complaint may be made under Section 20 of the Cattle-trespass Act, I of 1871 :
- (p) " officer in charge of a police-station " includes, when the officer " Officer in charge of a police-station." in charge of the police-station is absent from the station-house or unable from illness or other cause to perform his duties, the police-officer present at the station-house who is next in rank to such officer and is above the rank of constable or, when the Local Government so directs, any other police-officer so present :
- " Place." (q) " place " includes also a house, building, tent and vessel :
- (r) " pleader," used with reference to any proceeding in any Court, " Pleader." means a pleader authorised under any law for the time being in force to practise in such Court, and includes (1) an advocate, a vakil and an attorney of a High Court so authorised, and (2) any mukhtar or other person appointed with the permission of the Court to act in such proceeding :

(g) "police-station" means any post or place declared, generally or specially, by the Local Government to be a police-station, and includes any local area specified by the Local Government in this behalf :

(h) "Public Prosecutor" means any person appointed under Section 492, and includes any person acting under the directions of a Public Prosecutor and any person conducting a prosecution on behalf of Her Majesty in any High Court in the exercise of its original criminal jurisdiction :

"Subdivision."

(u) "subdivision" means a subdivision of a district :

(v) "summons-case" means a case relating to an offence, and not being a warrant-case.

(w) "warrant-case" means a case relating to an offence punishable with death, transportation or imprisonment for a term exceeding six months.

"Words referring to acts.

(2) Words which refer to acts done, extend also to illegal omissions ; and

all words and expressions used herein and defined in the Indian Penal Code, and not hereinbefore defined, shall be deemed to have the meanings respectively attributed to them by that Code, XLV of 1860.

5. (1) All offences under the Indian Penal Code, XLV of 1860, shall be investigated, enquired into, tried, and otherwise dealt with according to the provisions hereinafter contained.

(2) All offences under any other law shall be investigated, enquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, enquiring into, trying or otherwise dealing with such offences.

PART II.—CONSTITUTION AND POWERS OF CRIMINAL COURTS AND OFFICES.

CHAPTER II.

OF THE CONSTITUTION OF CRIMINAL COURTS AND OFFICES.

A.—Classes of Criminal Courts.

6. Besides the High Courts and the Courts constituted under any law other than this Code for the time being in force, there shall be five classes of Criminal Courts in British India, namely :—

I.—Courts of Session :

II.—Presidency Magistrates :

III.—Magistrates of the first class :

IV.—Magistrates of the second class :

V.—Magistrates of the third class.

B.—Territorial divisions.

7. (1) Every province (excluding the presidency-towns) shall be a sessions division, or shall consist of sessions divisions; and every sessions division shall, for the purposes of this Code, be a district or consist of districts.

(2) The Local Government may alter the limits, or, with the previous sanction of the Governor General in Council, the number of such divisions and districts.

(3) The sessions divisions and districts existing when this Code comes into force shall be sessions divisions and districts, respectively, unless and until they are so altered.

(4) Every presidency-town shall, for the purposes of this Code, be deemed to be a district.

8. (1) The Local Government may divide any district outside the presidency-towns into subdivisions, or make any portion of any such district a subdivision, and may alter the limits of any subdivision.

(2) All existing subdivisions which are now usually put under the charge of a Magistrate shall be deemed to have been made under this Code.

C.—Courts and offices outside the presidency-towns.

9. (1) The Local Government shall establish a Court of Session for every sessions division, and appoint a Judge of such Court.

(2) The Local Government may, by general or special order in the official Gazette, direct at what place or places the Court of Session shall hold its sitting; but, until such order be made, the Courts of Session shall hold their sittings as heretofore.

(3) The Local Government may also appoint Additional Sessions Judges and Assistant Sessions Judges to exercise jurisdiction in one or more such Courts.

(4) A Sessions Judge of one sessions division may be appointed by the Local Government to be also an Additional Sessions Judge of another division, and in such case he may sit for the disposal of cases at such place or places in either division as the Local Government may direct.

(5) All Courts of Session existing when this Code comes into force shall be deemed to have been established under this Act.

10. (1) In every district outside the presidency-towns the Local Government shall appoint a Magistrate of the first class, who shall be called the District Magistrate.

(2) The Local Government may appoint any Magistrate of the first class to be an Additional District Magistrate for a period not exceeding six months, and such Additional District Magistrate shall have all or any of the powers of a District Magistrate, under this Code as the Local Government may direct.

11. Whenever, in consequence of the office of a District Magistrate becoming vacant, any officer succeeds temporarily to the chief executive administration of the district, such officer shall, pending the orders of the Local Government, exercise all the powers and perform all the duties respectively conferred and imposed by this Code on the District Magistrate.

12. (1) The Local Government may appoint as many persons as it thinks fit, besides the District Magistrate, to be Magistrates of the first, second or third class in any district outside the presidency-towns; and the Local Government, or the District Magistrate, subject to the control of the Local Government, may, from time to time, define local areas within which such persons may exercise all or any of the powers with which they may respectively be invested under this Code.

Subordinate Magistrate.

Local limits of their jurisdiction.

(2) Except as otherwise provided by such definition, the jurisdiction and powers of such persons shall extend throughout such district.

13. (1) The Local Government may place any Magistrate of the first or second class in charge of a subdivision, and relieve him of the charge as occasion requires.

Power to put Magistrate in charge of subdivision.

(2) Such Magistrates shall be called Subdivisional Magistrates.

(3) The Local Government may delegate its powers under this section to the District Magistrate.

Delegation of powers to District Magistrate.

14. (1) The Local Government may confer upon any person all or any of the powers conferred or conferrable by or under this Code on a Magistrate of the first, second or third class in respect to particular cases or to a particular class or particular classes of cases, or in regard to cases generally, in any local area outside the presidency-towns.

Special Magistrates.

(2) Such Magistrates shall be called Special Magistrates, and shall be appointed for such term as the Local Government may by general or special order direct.

(3) With the previous sanction of the Governor General in Council the Local Government may delegate, with such limitations as it thinks fit, to any officer under its control the power conferred by sub-section (1).

(4) No powers shall be conferred under this section on any police-officer below the grade of Assistant District Superintendent, and no powers shall be conferred on a police-officer except so far as may be necessary for preserving the peace, preventing crime and detecting, apprehending and detaining offenders in order to their being brought before a Magistrate, and for the performance by the officer of any other duties imposed upon him by any law for the time being in force.

15. (1) The Local Government may direct any two or more Magistrates in any place outside the presidency-towns to sit together as a Bench, and may by order invest such Bench with any of the powers conferred or conferrable by or under this Code on a Magistrate of the first, second or third class, and direct it to exercise such powers in such cases, or such classes of cases only, and within such local limits as the Local Government thinks fit.

Bench of Magistrates.

(2) Except as otherwise provided by any order under this section, every such Bench shall have the powers conferred by this Code on a Magistrate of the highest class to which any one of its members, who is present taking part in the proceedings as a member of the Bench, belongs, and as far as practicable shall, for the purposes of this Code, be deemed to be a Magistrate of such class.

Powers exercisable by Bench in absence of special direction.

16. The Local Government may, or, subject to the control of the Local Government, the District Magistrate may, from time to time, make rules consistent with this Code for the guidance of Magistrates' Benches in any district respecting the following subjects :—

- (a) the classes of cases to be tried ;
- (b) the times and places of sitting ;
- (c) the constitution of the Bench for conducting trials ;
- (d) the mode of settling differences of opinion which may arise between the Magistrates in session.

17. (1) All Magistrates appointed under Sections 12, 13 and 14, and all Benches constituted under Section 15, shall be subordinate to the District Magistrate, and he may, from time to time, make rules or give special orders consistent with this Code as to the distribution of business among such Magistrates and Benches ; and

(2) Every Magistrate (other than a Subdivisional Magistrate) and every Bench exercising powers in a subdivision shall also be subordinate to the Subdivisional Magistrate, subject, however, to the general control of the District Magistrate.

(3) All Assistant Sessions Judges shall be subordinate to the Sessions Judge in whose Court they exercise jurisdiction, and he may, from time to time, make rules consistent with this Code as to the distribution of business among such Assistant Sessions Judges.

(4) The Sessions Judge may also, when he himself is unavoidably absent or incapable of acting, make provision for the disposal of any urgent application by an Additional or Assistant Sessions Judge or, if there be no Additional or Assistant Judge, by the District Magistrate, and such Judge or Magistrate shall have jurisdiction to deal with any such application.

(5) Neither the District Magistrate nor the Magistrates or Benches appointed or constituted under Sections 12, 13, 14 and 15 shall be subordinate to the Sessions Judge, except to the extent and in the manner hereinafter expressly provided.

D.—Courts of Presidency Magistrates.

18. (1) The Local Government shall, from time to time, appoint a sufficient number of persons (hereinafter called Presidency Magistrates) to be Magistrates for each of the presidency-towns, and shall appoint one of such persons to be Chief Presidency Magistrate for each such town.

(2) The powers of a Presidency Magistrate under this Code shall be exercised by the Chief Presidency Magistrate, or by a salaried Presidency Magistrate, or by any other Presidency Magistrate empowered by the Local Government to sit singly, or by any Bench of Presidency Magistrates.

19. Any two or more of such persons may (subject to the rules made by the Chief Presidency Magistrate under the power hereinafter conferred) sit together as a Bench.

20. Every Presidency Magistrate shall exercise jurisdiction in all places within the presidency-town for which he is appointed, and within the limits of the port of such town and of any navigable river or channel leading thereto, as such limits are defined under the law for the time being in force for the regulation of ports and port-dues.

21. (1) Every Chief Presidency Magistrate shall exercise within the local limits of his jurisdiction all the powers conferred on him by this Code or which by any law or rule in force immediately before this Code comes into force are required to be exercised by any Senior or Chief Presidency Magistrate, and may, from time to time, with the previous sanction of the Local Government, make rules consistent with this Code to regulate—

- (a) the conduct and distribution of business and the practice in the Courts of the Magistrates of the town;
- (b) the times and places at which Benches of Magistrates shall sit;
- (c) the constitution of such Benches;
- (d) the mode of settling differences of opinion which may arise between Magistrates in session; and
- (e) any other matter which could be dealt with by a District Magistrate under his general powers of control over the Magistrates subordinate to him.

(2) The Local Government may, for the purposes of this Code, declare what Presidency Magistrates are subordinate to the Chief Presidency Magistrate, and may define the extent of their subordination.

E.—Justices of the Peace.

22. The Governor General in Council, so far as regards the whole or any part of British India outside the presidency-towns, and every Local Government, so far as regards the territories subject to its administration (other than the towns aforesaid),

may, by notification in the official Gazette, appoint such European British subjects as he or it thinks fit to be Justices of the Peace within and for the territories mentioned in such notification.

23. The Local Government, so far as regards the towns of Calcutta, Madras and Bombay, may, by notification in the official Gazette, appoint to be Justices of the Peace within the limits of the town mentioned in such notification any persons resident within British India and not being the subjects of any foreign State whom the Local Government thinks fit.

24. (1) Every person now acting as a Justice of the Peace within and for any part of British India other than the said towns, under any commission issued by a High Court, shall be deemed to have been appointed under Section 22 by the Governor General in Council to act as a Justice of the Peace for the whole of British India other than the said towns.

(2) Every person now acting as a Justice of the Peace within the limits of any of the said towns under any such commission shall be deemed to have been appointed under Section 23 by the Local Government.

25. In virtue of their respective offices, the Governor General, Governors *Ex-officio* Justices of the Peace, Lieutenant-Governors and Chief Commissioners, the Ordinary Members of the Council of the Governor General, the Judges of the High Courts and the Recorder of Rangoon are Justices of the Peace within and for the whole of British India, Sessions Judges and District Magistrates are Justices of the Peace within and for the whole of the territories administered by the Local Government under which they are serving, and the Presidency Magistrates are Justices of the Peace within and for the towns of which they are respectively Magistrates.

F.—Suspension and removal.

26. All Judges of Criminal Courts other than the High Courts established by Royal Charter, and all Magistrates, may be suspended or removed from office by the Local Government:

Provided that such Judges and Magistrates as now are liable to be suspended or removed from office by the Governor General in Council only shall not be suspended or removed from office by any other authority.

27. The Governor General in Council may suspend or remove from office any Justice of the Peace appointed by him, and the Local Government may suspend or remove from office any Justice of the Peace appointed by it.

CHAPTER III.

POWERS OF COURTS.

A.—Description of offences cognisable by each Court.

28. Subject to the other provisions of this Code, any offence under the Indian Penal Code, XLV of 1860, may be tried—

(a) by the High Court, or

(b) by the Court of Session, or

(c) by any other Court by which such offence is shown in the eighth column of the second schedule to be triable.

Illustration.

A is committed to the Sessions Court on a charge of culpable homicide. He may be convicted of voluntarily causing hurt, an offence triable by a Magistrate.

29. (1) Subject to the provisions of Section 447, any offence under any other law shall, when any Court is mentioned in this behalf in such law, be tried by such Court.

(2) When no Court is so mentioned, it may be tried by the High Court or by any Court constituted under this Code by which such offence is shown in the eighth column of the second schedule to be triable.

30. In the territories respectively administered by the Lieutenant Governors of the Punjab and Burma and the Chief Commissioners of Oudh, the Central Provinces, Coorg and Assam, in Sind, and in those parts of the other Provinces in which there are Deputy Commissioners or Assistant Commissioners, Offences not punishable with death.

the Local Government may, notwithstanding anything contained in Section 29, invest the District Magistrate or any Magistrate of the first class with power to try as a Magistrate all offences not punishable with death.

B.—Sentences which may be passed by Courts of various classes.

Sentences which High Courts and Sessions Judges may pass. 31. (1) A High Court may pass any sentence authorised by law.

(2) A Sessions Judge or Additional Sessions Judge may pass any sentence authorised by law; but any sentence of death passed by any such Judge shall be subject to confirmation by the High Court.

(3) An Assistant Sessions Judge may pass any sentence authorised by law, except a sentence of death or of transportation for a term exceeding seven years, or of imprisonment for a term exceeding seven years.

Sentences which Magistrates may pass. 32. (1) The Courts of Magistrates may pass the following sentences, namely :—

- | | | |
|--|---|--|
| (a) Courts of Presidency Magistrates and of Magistrates of the first class : | { | Imprisonment for a term not exceeding two years, including such solitary confinement as is authorised by law ;
Fine not exceeding one thousand rupees ;
Whipping. |
| (b) Courts of Magistrates of the second class : | { | Imprisonment for a term not exceeding six months, including such solitary confinement as is authorised by law ;
Fine not exceeding two hundred rupees ;
Whipping (if specially empowered). |
| (c) Courts of Magistrates of the third class : | { | Imprisonment for a term not exceeding one month ;
Fine not exceeding fifty rupees. |

(2) The Court of any Magistrate may pass any lawful sentence, combining any of the sentences which it is authorised by law to pass.

(3) No Court of any Magistrate of the second class shall pass a sentence of whipping unless it is specially empowered in this behalf by the Local Government.

Power of Magistrates to sentence to imprisonment in default of fine. 33. (1) The Court of any Magistrate may award such term of imprisonment in default of payment of fine as is authorised by law in case of such default :

Provided that—

(a) the term is not in excess of the Magistrate's powers under this Code.

(b) in any case decided by a Magistrate where imprisonment has been awarded as part of the substantive sentence, the period of imprisonment awarded in default of payment of the fine shall not exceed one-fourth of the period of imprisonment which such Magistrate is competent to inflict as punishment for the offence otherwise than as imprisonment in default of payment of the fine.

(2) The imprisonment awarded under this section may be in addition to a substantive sentence of imprisonment for the maximum term awardable by the Magistrate under Section 32.

34. The Court of a Magistrate, specially empowered under Section 30, may pass any sentence authorised by law, except a sentence of death or of transportation for a term exceeding seven years or imprisonment for a term exceeding seven years.

Higher powers of certain District Magistrates.

35. (1) When a person is convicted at one trial of two or more distinct offences, the Court may sentence him, for such offences, to the several punishments prescribed therefor which such Court is competent to inflict; such punishments, when consisting of imprisonment or transportation, to commence the one after the expiration of the other in such order as the Court may direct, unless the Court directs that such punishments shall run concurrently.

Sentence in cases of conviction of several offences at one trial.

(2) In the case of consecutive sentences, it shall not be necessary for the Court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to inflict on convictions of a single offence, to send the offender for trial before a higher Court :

Provided as follows :—

Maximum term of punishment.

(a) in no case shall such person be sentenced to imprisonment for a longer period than fourteen years :

(b) if the case is tried by a Magistrate (other than a Magistrate acting under Section 34), the aggregate punishment shall not exceed twice the amount of punishment which he is, in the exercise of his ordinary jurisdiction, competent to inflict.

(3) For the purpose of appeal, aggregate sentences passed under this section in case of convictions for several offences at one trial shall be deemed to be a single sentence.

Explanation.—Separable offences which come within the provisions of Section 71 of the Indian Penal Code, XLV of 1860, are not distinct offences within the meaning of this section.

Illustration.

A breaks into a house with intent to commit theft and steals property therein. A has not committed distinct offences.

O.—Ordinary and additional powers.

36. All District Magistrates, Subdivisional Magistrates and Magistrates of the first, second and third classes, have the powers hereinafter respectively conferred upon them and specified in the third schedule. Such powers are called their "ordinary powers."

37. In addition to his ordinary powers, any Subdivisional Magistrate or any Magistrate of the first, second or third class, may be invested by the Local Government or the District Magistrate, as the case may be, with any powers specified in the fourth schedule as powers with which he may be invested by the Local Government or the District Magistrate.

Control of District Magistrate's investing power.

38. The power conferred on the District Magistrate by Section 37 shall be exercised subject to the control of the Local Government.

D.—Conferment, continuance and cancellation of powers.

39. (1) In conferring powers under this Code the Local Government may, by order, empower persons specially by name or in virtue of their office, or classes of officials generally by their official titles.

Mode of conferring powers.

(2) Every such order shall take effect from the date on which it is communicated to the person so empowered.

40. Whenever any person holding an office in the service of Government who has been invested with any powers under this Code throughout any local area is transferred to an equal or higher office of the same nature within a like local area under the same Local Government, he shall, unless the Local Government otherwise directs, or has otherwise directed, continue to exercise the same powers in the local area to which he is so transferred.

Continuance of powers of officers transferred.

41. (1) The Local Government may withdraw all or any of the powers conferred under this Code on any person by it or by its officers subordinate to it.

Powers may be cancelled.

(2) Any powers conferred by the District Magistrate may be withdrawn by the District Magistrate.

PART III.—GENERAL PROVISIONS.**CHAPTER IV.****OF AID AND INFORMATION TO THE MAGISTRATES, THE POLICE AND PERSONS MAKING ARRESTS.**

42. Every person is bound to assist a Magistrate or police-officer reasonably demanding his aid, whether within or without the presidency-towns,—

Public when to assist Magistrates and police.

(a) in the taking or preventing the escape of any other person whom such Magistrate or police-officer is authorised to arrest ;

(b) in the prevention or suppression of a breach of the peace, or in the prevention of any injury attempted to be committed to any railway, canal, telegraph or public property.

43. When a warrant is directed to a person other than a police-officer, any other person may aid in the execution of such warrant, if the person to whom the warrant is directed be near at hand and acting in the execution of the warrant.

Aid to person, other than police-officer executing warrant.

44. (1) Every person, whether within or without the presidency-towns, aware of the commission of, or of the intention of any other person to commit, any offence punishable under any of the following sections of the Indian Penal Code, XLV of 1860, namely, 121, 121A, 122, 123, 124, 124A, 125, 126, 130, 143, 144, 145, 147, 148, 302, 303, 304, 382, 392, 393, 394, 395, 396, 397, 398, 399, 402, 435, 436, 449, 450, 456, 457, 458, 459, and 460, shall, in the absence of reasonable excuse, the burden of proving which shall lie upon the person so aware, forthwith give information to the nearest Magistrate or police officer of such commission or intention.

Public to give information of certain offences.

(2) For the purposes of this section the term "offence" includes any act committed at any place out of British India which would constitute an offence if committed in British India.

45. (1) Every village-headman, village-accountant, village watchman, village-police-officer, owner or occupier of land, and the agent of any such owner or occupier, and every constable, land-holder and others bound to report officer employed in the collection of revenue or rent of certain matters. land on the part of Government or the Court of Wards, shall forthwith communicate to the nearest Magistrate or to the officer in charge of the nearest police-station, whichever is the nearer, any information which he may obtain respecting—

- (a) the permanent or temporary residence of any notorious receiver or vendor of stolen property in any village of which he is headman, accountant, watchman or police-officer, or in which he owns or occupies land, or is agent, or collects revenue or rent;
- (b) the resort to any place within, or the passage through, such village of any person whom he knows, or reasonably suspects, to be a *thug*, robber, escaped convict or proclaimed offender;
- (c) the commission of, or intention to commit, in or near such village any non-bailable offence or any offence punishable under Sections 143, 144, 145, 147, or 148, of the Indian Penal Code, XLV of 1860;
- (d) the occurrence in or near such village of any sudden or unnatural death or of any death under suspicious circumstances;
- (e) the commission of, or intention to commit, at any place out of British India near such village any act which, if committed in British India, would be an offence punishable under any of the following sections of the Indian Penal Code, XLV of 1860, namely, 302, 304, 382, 392, 393, 394, 395, 396, 397, 398, 399, 402, 435, 436, 449, 450, 457, 458, 459 and 460;
- (f) any matter likely to affect the maintenance of order or the prevention of crime or the safety of person or property respecting which the District Magistrate, by general or special order made with the previous sanction of the Local Government, has directed him to communicate information.

(2) In this section—

- (i) "village" includes village-lands; and
- (ii) the expression "proclaimed offender" includes any person proclaimed as an offender by any Court or authority established or continued by the Governor General in Council in any part of India in respect of any act which, if committed in British India, would be punishable under any of the following sections of the Indian Penal Code, XLV of 1860, namely, 302, 304, 382, 392, 393, 394, 395, 396, 397, 398, 399, 402, 435, 436, 449, 450, 457, 458, 459, and 460.

(3) Subject to rules in this behalf to be made by the Local Government the District Magistrate may from time to time appoint one or more persons to be village-headmen for the purposes of this section in any village for which there is no such headman appointed under any other law.

Appointment of village-headmen by District Magistrate in certain cases for purposes of this section.

CHAPTER V.

OF ARREST, ESCAPE AND RETAKING.

A.—Arrest generally.

46. (1) In making an arrest the police-officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action.

Arrest how made.
(2) If such person forcibly resists the endeavour to arrest him, or attempts to evade the arrest, such police-officer or other person may use all means necessary to effect the arrest.

Resisting endeavour to arrest.
(3) Nothing in this section gives a right to cause the death of a person who is not accused of an offence punishable with death, or with transportation for life.

47. If any person acting under a warrant of arrest, or any police-officer having authority to arrest, has reason to believe that the person to be arrested has entered into, or is within, any place, the person residing in, or being in charge of, such place shall, on demand of such person acting as aforesaid or such police-officer allow him free ingress thereto, and afford all reasonable facilities for a search therein.

48. If ingress to such place cannot be obtained under Section 47, it shall be lawful in any case for a person acting under a warrant and in any case in which a warrant may issue, but cannot be obtained without affording the person to be arrested an opportunity of escape, for a police-officer to enter such place and search therein, and, in order to effect an entrance into such place, to break open any outer or inner door or window of any house or place, whether that of the person to be arrested or of any other person, if after notification of his authority and purpose, and demand of admittance duly made he cannot otherwise obtain admittance:

Procedure where ingress not obtainable.
Provided that, if any such place is an apartment in the actual occupancy of a woman (not being the person to be arrested) who, according to custom, does not appear in public, such person or police-officer shall, before entering such apartment, give notice to such woman that she is at liberty to withdraw, and shall afford her every reasonable facility for withdrawing and may then break open the apartment and enter it.

49. Any police-officer or other person authorised to make an arrest may break open any outer or inner door or window of any house or place in order to liberate himself or any other person who, having lawfully entered for the purpose of making an arrest, is detained therein.

50. The person arrested shall not be subjected to more restraint than is necessary to prevent his escape.

51. Whenever a person is arrested by a police-officer under a warrant which does not provide for the taking of bail, or under a warrant which provides for the taking of bail, but the person arrested cannot furnish bail, and

Search of arrested persons.

whenever a person is arrested without warrant, or by a private person under a warrant, and cannot legally be admitted to bail, or is unable to furnish bail,

the officer making the arrest or, when the arrest is made by a private person, the police-officer to whom he makes over the person arrested, may search such person, and place in safe custody all articles, other than necessary wearing apparel, found upon him.

52. Whenever it is necessary to cause a woman to be searched, the search shall be made by another woman, with strict regard to decency.

53. The officer or other person making any arrest under this Code may take from the person arrested any offensive weapons which he has about his person, and shall deliver all weapons so taken to the Court or officer before which or whom the officer or person making the arrest is required by this Code to produce the person arrested.

B.—Arrest without warrant.

When police may arrest without warrant.

54. (1) Any police-officer may, without an order from a Magistrate and without a warrant, arrest—

first—any person who has been concerned in any cognizable offence or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been so concerned ;

secondly—any person having in his possession without lawful excuse, the burden of proving which excuse shall lie on such person, any implement of house-breaking ;

thirdly—any person who has been proclaimed as an offender either under this Code or by order of the Local Government ;

fourthly—any person in whose possession anything is found which may reasonably be suspected to be stolen property or who may reasonably be suspected of having committed an offence with reference to such thing ;

fifthly—any person who obstructs a police-officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody ;

sixthly—any person reasonably suspected of being a deserter from Her Majesty's Army or Navy, or of belonging to Her Majesty's Indian Marine Service, and being illegally absent from that service ;

seventhly—any person who has been concerned in, or against whom a reasonable complaint has been made or credible information has been received, or a reasonable suspicion exists of his having been concerned in, any act committed at any place out of British India, which, if committed in British India, would have been punishable as an offence, and for which he is, under any law relating to extradition or under the Fugitive Offenders Act, (44 and 45 Vict., c. 69) 1881, or otherwise, liable to be apprehended or detained in custody in British India ; and

eighthly—any released convict committing a breach of any rule made under Section 565, sub-section (3).

(2) This section applies also to the police in the towns of Calcutta and Bombay.

Arrest of vagabonds, habitual robbers, &c. 55. (1) Any officer in charge of a police-station may, in like manner, arrest or cause to be arrested—

- (a) any person found taking precautions to conceal his presence within the limits of such station, under circumstances which afford reason to believe that he is taking such precautions with a view to committing a cognizable offence; or
- (b) any person within the limits of such station who has no ostensible means of subsistence, or who cannot give a satisfactory account of himself; or
- (c) any person who is by repute an habitual robber, house-breaker or thief, or an habitual receiver of stolen property, knowing it to be stolen, or who by repute habitually commits extortion or in order to the committing of extortion habitually puts or attempts to put persons in fear of injury.

(2) This section applies also to the police in the towns of Calcutta and Bombay.

56. (1) When any officer in charge of a police-station requires any officer subordinate to him to arrest without a warrant (other-officer deputes subordinate wise than in his presence) any person who may lawfully be arrested without a warrant, he shall deliver to the officer required to make the arrest an order in writing, specifying the person to be arrested and the offence or other cause for which the arrest is to be made.

(2) This section applies also to the police in the towns of Calcutta and Bombay.

57. (1) When any person who in the presence of a police-officer has committed or has been accused of committing a non-cognizable offence refuses, on demand of such officer, to give his name and residence, or gives a name or residence which such officer has reason to believe to be false, he may be arrested by such officer in order that his name or residence may be ascertained.

(2) When the true name and residence of such person have been ascertained, he shall be released on his executing a bond, with or without sureties, to appear before a Magistrate if so required:

Provided that, if such person is not resident in British India, the bond shall be secured by a surety or sureties resident in British India.

(3) Should the true name and residence of such person not be ascertained within twenty-four hours from the time of arrest, or should he fail to execute the bond or, if so required to furnish sufficient sureties, he shall forthwith be forwarded to the nearest Magistrate having jurisdiction.

58. A police-officer may, for the purpose of arresting without warrant any person whom he is authorised to arrest under this chapter, pursue such person into any place in British India.

Pursuit of offenders into other jurisdictions.

59. (1) Any private person may arrest any person who, in his view, commits a non-bailable and cognizable offence, or who has been proclaimed as an offender;

Arrest by private persons.

and shall, without unnecessary delay, make over any person so arrested to a police-officer, or, in the absence of a police-officer, take such person to the nearest police-station.

(2) If there is reason to believe that such person comes under the provisions of Section 54, a police-officer shall re-arrest him.

(3) If there is reason to believe that he has committed a non-cognizable offence, and he refuses on the demand of a police-officer to give his name and residence, or gives a name or residence which such officer has reason to believe to be false, he shall be dealt with under the provisions of Section 57. If there is no sufficient reason to believe that he has committed any offence, he shall be at once released.

60. A police-officer making an arrest without warrant shall, without unnecessary delay and subject to the provisions herein contained as to bail, take or send the person arrested before a Magistrate having jurisdiction in the case, or before the officer in charge of a police-station.

61. No police-officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under Section 167, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court.

62. Officers in charge of police-stations shall report to the District Magistrate, or, if he so directs, to the Subdivisional Magistrate, the cases of all persons arrested without warrant within the limits of their respective stations, whether such persons have been admitted to bail or otherwise.

63. No person who has been arrested by a police-officer shall be discharged except on his own bond or on bail, or under the special order of a Magistrate.

64. When any offence is committed in the presence of a Magistrate within the local limits of his jurisdiction, he may himself arrest or order any person to arrest the offender, and may thereupon, subject to the provisions herein contained as to bail, commit the offender to custody.

65. Any Magistrate may at any time arrest or direct the arrest, in his presence, within the local limits of his jurisdiction, of any person for whose arrest he is competent at the time and in the circumstances to issue a warrant.

66. If a person in lawful custody escapes or is rescued, the person from whose custody he escaped or was rescued, may immediately pursue and arrest him in any place in British India.

67. The provisions of Sections 47, 48 and 49 shall apply to arrests under Section 66, although the person making any such arrest is not acting under a warrant, and is not a police-officer having authority to arrest.

CHAPTER VI.

OF PROCESSES TO COMPEL APPEARANCE.

A.—Summons.

68. (1) Every summons issued by a Court under this Code shall be in writing, in duplicate, signed and sealed by the presiding officer of such Court, or by such other officer as the High Court may, from time to time, by rule, direct.

Form of summons.

(2) Such summons shall be served by a police-officer, or, subject to such rules as the Local Government may prescribe in this behalf, by an officer of the Court issuing it or other public servant.

Summons by whom served.

(3) This section applies also to the police in the towns of Calcutta and Bombay.

69. (1) The summons shall, if practicable, be served personally on the person summoned, by delivering or tendering to him one of the duplicates of the summons.

Summons how served.

(2) Every person on whom a summons is so served shall, if so required by the serving officer, sign a receipt therefor on the back of the other duplicate.

Signature of receipt for summons.

(3) Service of a summons on an incorporated company or other body corporate may be effected by serving it on the secretary, local manager or other principal officer of the corporation or by registered post letter addressed to the chief officer of the corporation in British India. In such case the service shall be deemed to have been effected when the letter would arrive in ordinary course of post.

70. Where the person summoned cannot by the exercise of due diligence be found, the summons may be served by leaving one of the duplicates for him with some adult male member of his family, or in a presidency-town, with his servant residing with him; and the person with whom the summons is so left, shall, if so required by the serving officer, sign a receipt therefor on the back of the other duplicate.

Service when person summoned cannot be found.

71. If service in the manner mentioned in Sections 69 and 70 cannot by the exercise of due diligence be effected, the serving officer shall affix one of the duplicates of the summons to some conspicuous part of the house or homestead in which the person summoned ordinarily resides; and thereupon the summons shall be deemed to have been duly served.

Procedure when service cannot be effected as before provided.

72. (1) Where the person summoned is in the active service of the Government or of a Railway Company, the Court issuing the summons shall ordinarily send it in duplicate to the head of the office in which such person is employed; and such head shall thereupon cause the summons to be served in manner provided by Section 69, and shall return it to the Court under his signature with the endorsement required by that section.

Service on servant of Government or of Railway Company.

(2) Such signature shall be evidence of due service.

73. When a Court desires that a summons issued by it shall be served at any place outside the local limits of its jurisdiction, it shall ordinarily send such summons in duplicate to a Magistrate within the local limits of whose jurisdiction the person summoned resides or is, to be there served.

Service of summons outside local limits.

74. (1) When a summons issued by a Court is served outside the local limits of its jurisdiction, and in any case where the officer who has served a summons is not present at the hearing of the case, an affidavit, purporting to be made before a Magistrate, that such summons has been served, and a duplicate of the summons purporting to be endorsed (in manner provided by Section 69 or Section 70) by the person to whom it was delivered or tendered or with whom it was left, shall be admissible in evidence, and the statements made therein shall be deemed to be correct unless and until the contrary is proved.

Proof of service in such cases, and when serving officer not present.

(2) The affidavit mentioned in this section may be attached to the duplicate of the summons and returned to the Court.

B.—Warrant of arrest.

75. (1) Every warrant of arrest issued by a Court under this Code shall be in writing, signed by the presiding officer, or, in the case of a Bench of Magistrates, by any member of such Bench; and shall bear the seal of the Court.

Form of warrant of arrest.

(2) Every such warrant shall remain in force until it is cancelled by the Court which issued it, or until it is executed.

Continuance of warrant of arrest.

76. (1) Any Court issuing a warrant for the arrest of any person may in its discretion direct by endorsement on the warrant that, if such person executes a bond with sufficient sureties for his attendance before the Court at a specified time and thereafter until otherwise directed by the Court, the officer to whom the warrant is directed, shall take such security and shall release such person from custody.

Court may direct security to be taken.

(2) The endorsement shall state—

(a) the number of sureties;

(b) the amount in which they and the person for whose arrest the warrant is issued, are to be respectively bound; and

(c) the time at which he is to attend before the Court.

(3) Whenever security is taken under this section the officer to whom the warrant is directed, shall forward the bond to the Court.

Recognizance to be forwarded.

77. (1) A warrant of arrest shall ordinarily be directed to one or more police-officers, and, when issued by a Presidency Magistrate, shall always be so directed; but any other Court issuing such a warrant may, if its immediate execution is necessary and no police-officer is immediately available, direct it to any other person or persons; and such person or persons shall execute the same.

Warrants to whom directed.

(2) When a warrant is directed to more officers or persons than one, it may be executed by all, or by any one or more, of them.

Warrant to several persons.

78. (1) A District Magistrate or Subdivisional Magistrate may direct a warrant to any land-holder, farmer or manager of land within his district or subdivision for the arrest of any escaped convict, proclaimed offender or person who has been accused of a non-bailable offence, and who has eluded pursuit.

Warrant may be directed to land-holders, &c.

(2) Such land-holder, farmer or manager shall acknowledge in writing the receipt of the warrant, and shall execute it if the person for whose arrest it was issued, is in, or enters on, his land or farm, or the land under his charge.

(3) When the person against whom such warrant is issued, is arrested, he shall be made over with the warrant to the nearest police-officer, who shall cause him to be taken before a Magistrate having jurisdiction in the case, unless security is taken under Section 76.

79. A warrant directed to any police-officer may also be executed by any other police-officer whose name is endorsed upon the warrant by the officer to whom it is directed or endorsed.

Warrant directed to police-officer.

80. The police-officer or other person executing a warrant of arrest shall notify the substance thereof to the person to be arrested, and if so required, shall show him the warrant.

81. The police-officer or other person executing a warrant of arrest shall (subject to the provisions of Section 76 as to security) without unnecessary delay bring the person arrested before the Court before which he is required by law to produce such person.

Person arrested to be brought before Court without delay.

82. A warrant of arrest may be executed at any place in British India.

Where warrant may be executed.

83. (1) When a warrant is to be executed outside the local limits of the jurisdiction of the Court issuing the same, such Court may, instead of directing such warrant to a police-officer, forward the same by post or otherwise to any Magistrate or District Superintendent of Police or the Commissioner of Police in a presidency-town within the local limits of whose jurisdiction it is to be executed.

Warrant forwarded for execution outside jurisdiction.

(2) The Magistrate or District Superintendent or Commissioner to whom such warrant is so forwarded shall endorse his name thereon and, if practicable, cause it to be executed in manner hereinbefore provided within the local limits of his jurisdiction.

84. (1) When a warrant directed to a police-officer is to be executed beyond the local limits of the jurisdiction of the Court issuing the same, he shall ordinarily take it for endorsement either to a Magistrate or to a police-officer not below the rank of an officer in charge of a station within the local limits of whose jurisdiction the warrant is to be executed.

Warrant directed to police-officer for execution outside jurisdiction.

(2) Such Magistrate or police-officer shall endorse his name thereon, and such endorsement shall be sufficient authority to the police-officer to whom the warrant is directed to execute the same within such limits, and the local police shall, if so required, assist such officer in executing such warrant.

(3) Whenever there is reason to believe that the delay occasioned by obtaining the endorsement of the Magistrate or police-officer within the local limits of whose jurisdiction the warrant is to be executed, will prevent such execution,

the police-officer to whom it is directed, may execute the same without such endorsement in any place beyond the local limits of the jurisdiction of the Court which issued it.

(4) This section applies also to the police in the towns of Calcutta and Bombay.

85. When a warrant of arrest is executed outside the district in which it was issued, the person arrested shall, unless the Court which issued the warrant, is within twenty miles of the place of arrest or is nearer than the Magistrate or District Superintendent of Police or the Commissioner of Police in a presidency-town within the local limits of whose jurisdiction the arrest was made, or unless security is taken under Section 76, be taken before such Magistrate or Commissioner or District Superintendent.

86. (1) Such Magistrate or District Superintendent or Commissioner shall, if the person arrested appears to be the person intended by the Court which issued the warrant, direct his removal in custody to such Court :

Procedure by Magistrate before whom person arrested is brought.

Provided that, if the offence is bailable, and such person is ready and willing to give bail to the satisfaction of such Magistrate, District Superintendent or Commissioner, or a direction has been endorsed under Section 76 on the warrant and such person is ready and willing to give the security required by such direction, the Magistrate, District Superintendent or Commissioner shall take such bail or security, as the case may be, and forward the bond to the Court which issued the warrant.

(2) Nothing in this section shall be deemed to prevent a police-officer from taking security under Section 76.

C.—Proclamation and attachment.

87. (1) If any Court has reason to believe (whether after taking evidence or not) that any person against whom a warrant has been issued by it, has absconded or is concealing himself so that such warrant cannot be executed, such Court may publish a written proclamation requiring him to appear at a specified place and at a specified time not less than thirty days from the date of publishing such proclamation.

(2) The proclamation shall be published as follows :—

(a) it shall be publicly read in some conspicuous place of the town or village in which such person ordinarily resides ; .

(b) it shall be affixed to some conspicuous part of the house or homestead in which such person ordinarily resides or to some conspicuous place of such town or village ; and

(c) a copy thereof shall be affixed to some conspicuous part of the Court-house.

(3) A statement in writing by the Court issuing the proclamation to the effect that the proclamation was duly published on a specified day shall be conclusive evidence that the requirements of this section have been complied with, and that the proclamation was published on such day.

88. (1) The Court issuing a proclamation under Section 87 may at any time order the attachment of any property, movable or immovable, or both, belonging to the proclaimed person.

Attachment of property of person absconding.

(2) Such order shall authorise the attachment of any property belonging to such person within the district in which it is made; and it shall authorise the attachment of any property belonging to such person without such district when endorsed by the District Magistrate or Chief Presidency Magistrate within whose district such property is situate.

(3) If the property ordered to be attached is a debt or other movable property, the attachment under this section shall be made—

(a) by seizure; or

(b) by the appointment of a receiver; or

(c) by an order in writing prohibiting the delivery of such property to the proclaimed person or to any one on his behalf; or

(d) by all or any two of such methods, as the Court thinks fit.

(4) If the property ordered to be attached is immovable, the attachment under this section shall, in the case of land paying revenue to Government, be made through the Collector of the district in which the land is situate, and in all other cases—

(e) by taking possession; or

(f) by the appointment of a receiver; or

(g) by an order in writing prohibiting the payment of rent or delivery of property to the proclaimed person or to any one on his behalf; or

(h) by all or any two of such methods, as the Court thinks fit.

(5) If the property ordered to be attached consists of live-stock or is of a perishable nature, the Court may, if it thinks it expedient, order immediate sale thereof, and in such case the proceeds of the sale shall abide the order of the Court.

(6) The powers, duties and liabilities of a receiver appointed under this section shall be the same as those of a receiver appointed under Chapter XXXVI of the Code of Civil Procedure, XIV of 1882.

(7) If the proclaimed person does not appear within the time specified in the proclamation, the property under attachment shall be at the disposal of Government; but it shall not be sold until the expiration of six months from the date of the attachment, unless it is subject to speedy and natural decay, or the Court considers that the sale would be for the benefit of the owner, in either of which cases the Court may cause it to be sold whenever it thinks fit.

89. If, within two years from the date of the attachment, any person whose property is or has been at the disposal of Government, under sub-section (7) of Section 88, appears voluntarily or is apprehended and brought before the Court by whose order the property was attached, or the Court to which such Court is subordinate, and proves to the satisfaction of such Court that he did not abscond or conceal himself for the purpose of avoiding execution of the warrant, and that he had not such notice of the proclamation as to enable him to attend within the time specified therein, such property, or, if the same has been sold, the net proceeds of the sale, or, if part only thereof has been sold, the net proceeds of the sale and the residue of the property, shall, after satisfying thereout all costs incurred in consequence of the attachment, be delivered to him.

D.—Other Rules regarding Processes.

90. A Court may, in any case in which it is empowered by this Code to
 Issue of warrant in lieu of, or in addition to, summons. issue a summons for the appearance of any person other than a juror or assessor, issue, after recording its reasons in writing, a warrant for his arrest—

(a) if, either before the issue of such summons, or after the issue of the same but before the time fixed for his appearance, the Court sees reason to believe that he has absconded or will not obey the summons; or

(b) if at such time he fails to appear and the summons is proved to have been duly served in time to admit of his appearing in accordance therewith and no reasonable excuse is offered for such failure.

91. When any person for whose appearance or arrest the officer presiding in any Court is empowered to issue a summons or warrant is present in such Court, such officer may require such person to execute a bond, with or without sureties, for his appearance in such Court.

92. When any person who is bound by any bond taken under this Code to appear before a Court, does not so appear, the officer presiding in such Court may issue a warrant directing that such person be arrested and produced before him.

93. The provisions contained in this chapter, relating to a summons and warrant, and their issue, service and execution, shall, so far as may be, apply to every summons and every warrant of arrest issued under this Code.

CHAPTER VII.

OF PROCESSES TO COMPEL THE PRODUCTION OF DOCUMENTS AND OTHER MOVABLE PROPERTY, AND FOR THE DISCOVERY OF PERSONS WRONGFULLY CONFINED.

A.—Summons to produce.

94. (1) Whenever any Court, or, in any place beyond the limits of the towns of Calcutta and Bombay, any officer in charge of a police station, considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such Court or officer, such Court may issue a summons, or such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order.

(2) Any person required under this section merely to produce a document or other thing shall be deemed to have complied with the requisition, if he causes such document or thing to be produced instead of attending personally to produce the same.

(3) Nothing in this section shall be deemed to affect the Indian Evidence Act, 1 of 1872, Sections 123 and 124, or to apply to a letter, post card, telegram or other document or any parcel or thing in the custody of the Postal or Telegraph Authorities.

95. (1) If any document, parcel or thing in such custody is, in the opinion of any District Magistrate, Chief Presidency Magistrate, High Court or Court of Session, wanted for the purpose of any investigation, inquiry, trial or other proceeding under this Code, such Magistrate or Court may require the Postal or Telegraph Authorities, as the case may be, to deliver such document, parcel or thing to such person as such Magistrate or Court directs.

(2) If any such document, parcel or thing is, in the opinion of any other Magistrate, or of any Commissioner of Police or District Superintendent of Police, wanted for any such purpose, he may require the Postal or Telegraph Department, as the case may be, to cause search to be made for and to detain such document, parcel or thing pending the orders of any such District Magistrate, Chief Presidency Magistrate or Court.

B.—Search-warrants.

96. (1) Where any Court has reason to believe that a person to whom a summons or order under Section 94, or a requisition under Section 95, sub-section (1), has been or might be addressed, will not or would not produce the document or thing as required by such summons or requisition,

or where such document or thing is not known to the Court to be in the possession of any person,

or where the Court considers that the purposes of any inquiry, trial or other proceeding under this Code will be served by a general search or inspection,

it may issue a search-warrant; and the person to whom such warrant is directed, may search or inspect in accordance therewith and the provisions hereinafter contained.

(2) Nothing herein contained shall authorise any Magistrate other than a District Magistrate or Chief Presidency Magistrate to grant a warrant to search for a document, parcel or other thing in the custody of the Postal or Telegraph Authorities.

97. The Court may, if it thinks fit, specify in the warrant the particular place or part thereof to which only the search or inspection shall extend; and the person charged with the execution of such warrant shall then search or inspect only the place or part so specified.

98. (1) If a District Magistrate, Subdivisional Magistrate, Presidency Magistrate or Magistrate of the first class, upon information and after such inquiry as he thinks necessary, has reason to believe that any place is used for the deposit or sale of stolen property,

or for the deposit or sale or manufacture of forged documents, false seals or counterfeit stamps or coin, or instruments or materials for counterfeiting coin or stamps or for forging;

or that any forged documents, false seals or counterfeit stamps, or coin, or instruments or materials used for counterfeiting coin or stamps or for forging are kept or deposited in any place,

he may by his warrant authorise any police-officer above the rank of a constable—

(a) to enter, with such assistance as may be required, such place, and

- (b) to search the same in manner specified in the warrant, and
 - (c) to take possession of any property, documents, seals, stamps or coins therein found which he reasonably suspects to be stolen, unlawfully obtained, forged, false or counterfeit, and also of any such instruments and materials as aforesaid, and
 - (d) to convey such property, documents, seals, stamps, coins, instruments or materials before a Magistrate, or to guard the same on the spot until the offender is taken before a Magistrate, or otherwise to dispose thereof in some place of safety, and
 - (e) to take into custody and carry before a Magistrate, every person found in such place who appears to have been privy to the deposit, sale or manufacture or keeping of any such property, documents, seals, stamps, coins, instruments or materials, knowing or having reasonable cause to suspect the said property to have been stolen or otherwise unlawfully obtained, or the said documents, seals, stamps, coins, instruments or materials to have been forged, falsified or counterfeited, or the said instruments or materials to have been or to be intended to be used for counterfeiting coin or stamps or for forging.
- (2) The provisions of this section with respect to—
- (a) counterfeit coin,
 - (b) coin suspected to be counterfeit, and
 - (c) instruments or materials for counterfeiting coin,

shall, so far as they can be made applicable, apply, respectively, to—

- (a) pieces of metal made in contravention of the Metal Tokens Act, I of 1889, or brought into British India in contravention of any notification for the time being in force under Section 19 of the Sea Customs Act, VIII of 1878,
- (b) pieces of metal suspected to have been so made or to have been so brought into British India or to be intended to be issued in contravention of the former of those Acts, and
- (c) instruments or materials for making pieces of metal in contravention of that Act.

99. When, in the execution of a search-warrant at any place beyond the local limits of the jurisdiction of the Court which issued the same, any of the things for which search is made, are found, such things, together with the list of the same prepared under the provisions hereinafter contained, shall be immediately taken before the Court issuing the warrant, unless such place is nearer to the Magistrate having jurisdiction therein than to such Court, in which case the list and things shall be immediately taken before such Magistrate; and, unless there be good cause to the contrary, such Magistrate shall make an order authorising them to be taken to such Court.

C.—Discovery of Persons wrongfully confined.

100. If any Presidency Magistrate, Magistrate of the first class or Sub-divisional Magistrate has reason to believe that any person is confined, under such circumstances that the confinement amounts to an offence, he may issue a search-warrant, and the person to whom such warrant is directed may search

Search for persons wrongfully confined.

for the person so confined ; and such search shall be made in accordance therewith, and the person, if found, shall be immediately taken before a Magistrate, who shall make such order as in the circumstances of the case seems proper.

D.—General Provisions relating to Searches.

101. The provisions of Sections 43, 75, 77, 79, 82, 83 and 84 shall, so far as may be, apply to all search-warrants issued under Direction, &c., of search-warrants. Section 96, Section 98, or Section 100.

102. (1) Whenever any place liable to search or inspection under this chapter is closed, any person residing in, or being in charge of, such place shall, on demand of the officer or other person executing the warrant, and on production of the warrant, allow him free ingress thereto, and afford all reasonable facilities for a search therein.

(2) If ingress into such place cannot be so obtained, the officer or other person executing the warrant may proceed in manner provided by Section 48.

(3) Where any person in or about such place is reasonably suspected of concealing about his person any article for which search should be made, such person may be searched. If such person is a woman, the directions of Section 52 shall be observed.

103. (1) Before making a search under this chapter, the officer or other person about to make it shall call upon two or more respectable inhabitants of the locality in which the place to be searched is situate to attend and witness the search.

(2) The search shall be made in their presence, and a list of all things seized in the course of such search and of the places in which they are respectively found shall be prepared by such officer or other person and signed by such witnesses ; but no person witnessing a search under this section shall be required to attend the Court as a witness of the search unless specially summoned by it.

(3) The occupant of the place searched, or some person in his behalf, shall, in every instance, be permitted to attend during the search, and a copy of the list prepared under this section, signed by the said witnesses, shall be delivered to such occupant or person at his request.

(4) When any person is searched under Section 102, sub-section (3), a list of all things taken possession of shall be prepared, and a copy thereof shall be delivered to such person at his request.

E.—Miscellaneous.

104. Any Court may, if it thinks fit, impound any document or thing produced before it under this Code.

105. Any Magistrate may direct a search to be made in his presence of any place for the search of which he is competent to issue a search-warrant.

PART IV.—PREVENTION OF OFFENCES.

CHAPTER VIII.

OF SECURITY FOR KEEPING THE PEACE AND FOR GOOD BEHAVIOUR.

A.—Security for keeping the Peace on Conviction.

106. (1) Whenever any person accused of rioting, assault or other offence involving a breach of the peace, or of abetting the same, or of assembling armed men or taking other unlawful measures with the evident intention of committing the same, or any person accused of committing criminal intimidation, is convicted of such offence before a High Court, a Court of Session or the Court of a Presidency Magistrate, a District Magistrate, a Subdivisional Magistrate or a Magistrate of the first class,

and such Court is of opinion that it is necessary to require such person to execute a bond for keeping the peace,

such Court may at the time of passing sentence on such person, order him to execute a bond for a sum proportionate to his means, with or without sureties for keeping the peace during such period, not exceeding three years, as it thinks fit to fix.

(2) If the conviction is set aside on appeal or otherwise, the bond so executed shall become void.

(3) An order under this section may also be made by an Appellate Court or by the High Court when exercising its powers of revision.

B.—Security for keeping the Peace in other cases and Security for Good Behaviour.

107. (1) Whenever a Presidency Magistrate, District Magistrate, Subdivisional Magistrate or Magistrate of the first class is informed that any person is likely to commit a breach of the peace or disturb the public tranquillity, or to do any wrongful act that may probably occasion a breach of the peace, or disturb the public tranquillity, the Magistrate may, in manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with or without sureties, for keeping the peace for such period not exceeding one year as the Magistrate thinks fit to fix.

(2) Proceedings shall not be taken under this section unless either the person informed against, or the place where the breach of the peace or disturbance is apprehended, is within the local limits of such Magistrate's jurisdiction, and no proceedings shall be taken before any Magistrate, other than a Chief Presidency or District Magistrate, unless both the person informed against and the place where the breach of the peace or disturbance is apprehended, are within the local limits of the Magistrate's jurisdiction.

(3) When any Magistrate not empowered to proceed under sub-section (1) has reason to believe that any person is likely to commit a breach of the peace or disturb the public tranquillity or to do any wrongful act that may probably occasion a breach of the peace or disturb the public tranquillity, and that such breach of the peace or disturbance cannot be prevented otherwise than by detaining such person in custody, such Magistrate or Court may, after recording his reasons, issue a warrant for his arrest (if he is not already in custody or before the Court), and may send him before a Magistrate empowered to deal with the case, together with a copy of his reasons.

(4) A Magistrate before whom a person is sent under this section, may in his discretion detain such person in custody until the completion of the inquiry hereinafter prescribed.

108. Whenever a Chief Presidency or District Magistrate, or a Presidency Magistrate or Magistrate of the first class specially empowered by the Local Government in this behalf, has information that there is within the limits of his jurisdiction any person who, within or without such limits, either orally or in writing, disseminates or attempts to disseminate, or in anywise abets the dissemination of,—

- (a) any seditious matter, that is to say, any matter the publication of which is punishable under Section 124 A of the Indian Penal Code, XLV of 1860, or
- (b) any matter the publication of which is punishable under Section 153A of the Indian Penal Code, or
- (c) any matter concerning a Judge which amounts to criminal intimidation or defamation under the Indian Penal Code,

such Magistrate may (in manner hereinafter provided) require such person to show cause why he should not be ordered to execute a bond, with or without sureties, for his good behaviour for such period, not exceeding one year, as the Magistrate thinks fit to fix.

No proceedings shall be taken under this section against the editor, proprietor, printer or publisher of any publication registered under, or printed or published in conformity with, the rules laid down in the Press and Registration of Books Act, XXV of 1867, except by the order or under the authority of the Governor General in Council or the Local Government or some officer empowered by the Governor General in Council in this behalf.

Security for good behaviour from vagrants and suspected persons.

109. Whenever a Presidency Magistrate, District Magistrate, Subdivisional Magistrate or Magistrate of the first class receives information—

- (a) that any person is taking precautions to conceal his presence within the local limits of such Magistrate's jurisdiction, and that there is reason to believe that such person is taking such precautions with a view to committing any offence, or
- (b) that there is within such limits a person who has no ostensible means of subsistence, or who cannot give a satisfactory account of himself,

such Magistrate may, in manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with sureties, for his good behaviour for such period, not exceeding one year, as the Magistrate thinks fit to fix.

110. Whenever a Presidency Magistrate, District Magistrate, or Subdivisional Magistrate or a Magistrate of the first class specially empowered in this behalf by the Local Government receives information that any person within the local limits of his jurisdiction—

- (a) is by habit a robber, house-breaker or thief, or
- (b) is by habit a receiver of stolen property knowing the same to have been stolen,

- (c) habitually protects or harbours thieves or aids in the concealment or disposal of stolen property, or
- (d) habitually commits mischief, extortion or cheating or counterfeiting coin, currency notes or stamps, or attempts so to do, or
- (e) habitually commits, or attempts to commit, or abets the commission of, offences involving a breach of the peace, or
- (f) is so desperate and dangerous as to render his being at large without security hazardous to the community,

such Magistrate may, in manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with sureties, for his good behaviour for such period, not exceeding three years, as the Magistrate thinks fit to fix.

111. The provisions of Sections 109 and 110 do not apply to European British subjects in cases where they may be dealt with under the European Vagrancy Act, X of 1874.
 proviso as to European vagrants.

112. When a Magistrate acting under Section 107, Section 108, Section 109 or Section 110 deems it necessary to require any person to show cause under such section, he shall make an order in writing, setting forth the substance of the information received, the amount of the bond to be executed, the term for which it is to be in force, and the number, character and class of sureties (if any) required.
 Order to be made.

113. If the person in respect of whom such order is made, is present in Court, it shall be read over to him, or, if he so desires, the substance thereof shall be explained to him.
 Procedure in respect of person present in Court.

114. If such person is not present in Court, the Magistrate shall issue a summons requiring him to appear, or, when such person is in custody, a warrant directing the officer in whose custody he is, to bring him before the Court:
 Summons or warrant in case of person not so present.

Provided that whenever it appears to such Magistrate, upon the report of a police-officer or upon other information (the substance of which report or information shall be recorded by the Magistrate), that there is reason to fear the commission of a breach of the peace, and that such breach of the peace cannot be prevented otherwise than by the immediate arrest of such person, the Magistrate may at any time issue a warrant for his arrest.

115. Every summons or warrant issued under Section 114 shall be accompanied by a copy of the order made under Section 112, and such copy shall be delivered by the officer serving summons or warrant, or executing such summons or warrant to the person served with, or arrested under, the same.
 Copy of order under Section 112 to accompany summons or warrant.

116. The Magistrate may, if he sees sufficient cause, dispense with the personal attendance of any person called upon to show cause why he should not be ordered to execute a bond for keeping the peace, and may permit him to appear by a pleader.
 Power to dispense with personal attendance.

117. (1) When an order under Section 112 has been read or explained under Section 113 to a person present in Court, or when any person appears or is brought before a Magistrate in compliance with, or in execution of, a summons or warrant issued under Section 114, the Magistrate shall proceed to
 Inquiry as to truth of information.

inquire into the truth of the information upon which action has been taken, and to take such further evidence as may appear necessary.

(2) Such inquiry shall be made, as nearly as may be practicable where the order requires security for keeping the peace, in the manner hereinafter prescribed for conducting trials and recording evidence in summons-cases; and, where the order requires security for good behaviour, in the manner hereinafter prescribed for conducting trials and recording evidence in warrant-cases, except that no charge need be framed.

(3) For the purposes of this section the fact that a person is an habitual offender may be proved by evidence of general repute or otherwise.

(4) Where two or more persons have been associated together in the matter under inquiry, they may be dealt with in the same or separate inquiries as the Magistrate shall think just.

118. (1) If, upon such inquiry, it is proved that it is necessary for keeping the peace or maintaining good behaviour, as the case may be, that the person in respect of whom the inquiry is made should execute a bond, with or without sureties, the Magistrate shall make an order accordingly :

Provided—

first, that no person shall be ordered to give security of a nature different from, or of an amount larger than, or for a period longer than, that specified in the order made under Section 112:

secondly, that the amount of every bond shall be fixed with due regard to the circumstances of the case and shall not be excessive :

thirdly, that, when the person in respect of whom the inquiry is made is a minor, the bond shall be executed only by his sureties.

119. If, on an inquiry under Section 117, it is not proved that it is necessary for keeping the peace or maintaining good behaviour, as the case may be, that the person in respect of whom the inquiry is made, should execute a bond, the Magistrate shall make an entry on the record to that effect, and, if such person is in custody only for the purposes of the inquiry, shall release him, or, if such person is not in custody, shall discharge him.

C.—Proceedings in all cases subsequent to order to furnish security.

120. (1) If any person in respect of whom an order requiring security is made under Section 106 or Section 118, is, at the time such order is made, sentenced to, or undergoing a sentence of, imprisonment, the period for which such security is required shall commence on the expiration of such sentence.

(2) In other cases such period shall commence on the date of such order unless the Magistrate, for sufficient reason, fixes a later date.

121. The bond to be executed by any such person shall bind him to keep the peace or to be of good behaviour, as the case may be, and in the latter case the commission or attempt to commit, or the abetment of, any offence punishable with imprisonment, wherever it may be committed, is a breach of the bond.

122. A Magistrate may refuse to accept any surety offered under this chapter, on the ground that, for reasons to be recorded by the Magistrate, such surety is an unfit person.

123. (1) If any person ordered to give security under Section 106 or Section 118 does not give such security on or before the date on which the period for which such security is to be given, commences, he shall, except in the case next hereinafter mentioned, be committed to prison, or, if he is already in prison, be detained in prison until such period expires or until within such period he gives the security to the Court or Magistrate who made the order requiring it.

(2) When such person has been ordered by a Magistrate to give security for a period exceeding one year, such Magistrate shall, if such person does not give such security as aforesaid, issue a warrant directing him to be detained in prison pending the orders of the Sessions Judge or, if such Magistrate is a Presidency Magistrate, pending the orders of the High Court; and the proceedings shall be laid, as soon as conveniently may be, before such Court.

(3) Such Court, after examining such proceedings and requiring from the Magistrate any further information or evidence which it thinks necessary, may pass such order on the case as it thinks fit:

Provided that the period (if any) for which any person is imprisoned for failure to give security, shall not exceed three years.

(4) If the security is tendered to the officer in charge of the jail, he shall forthwith refer the matter to the Court or Magistrate who made the order, and shall await the orders of such Court or Magistrate.

(5) Imprisonment for failure to give security for keeping the peace shall be simple.

(6) Imprisonment for failure to give security for good behaviour may be rigorous or simple as the Court or Magistrate in each case directs.

124. (1) Whenever the District Magistrate or a Chief Presidency Magistrate is of opinion that any person imprisoned for failing to give security under this chapter, whether by the order of such Magistrate or that of his predecessor in office, or of some subordinate Magistrate, may be released without hazard to the community or to any other person, he may order such person to be discharged.

(2) Whenever any person has been imprisoned for failing to give security under this chapter, the Chief Presidency or District Magistrate may (unless the order has been made by some Court superior to his own) make an order reducing the amount of the security or the number of sureties, or the time for which security has been required.

(3) Whenever the District Magistrate or a Chief Presidency Magistrate is of opinion that any person imprisoned for failing to give security under this chapter as ordered by the Court of Session or High Court may be released without hazard to the community, such Magistrate shall make an immediate report of the case for the orders of the Court of Session or High Court, as the case may be, and such Court may, if it thinks fit, order such person to be discharged.

125. The Chief Presidency or District Magistrate may at any time, for sufficient reasons to be recorded in writing, cancel any bond for keeping the peace or for good behaviour executed under this chapter by order of any Court in his district not superior to his Court.

Power of District Magistrate to cancel any bond for keeping the peace or good behaviour.

126. (1) Any surety for the peaceable conduct or good behaviour of another person may at any time apply to a Presidency Magistrate, District Magistrate, Subdivisional Magistrate or Magistrate of the first class to cancel any bond executed under this chapter within the local limits of his jurisdiction.

Discharge of sureties.

(2) On such application being made, the Magistrate shall issue his summons or warrant, as he thinks fit, requiring the person for whom such surety is bound to appear or to be brought before him.

(3) When such person appears or is brought before the Magistrate, such Magistrate shall cancel the bond, and shall order such person to give, for the unexpired portion of the term of such bond, fresh security of the same description as the original security. Every such order shall, for the purposes of Sections 121, 122, 123 and 124, be deemed to be an order made under Section 106 or Section 118, as the case may be.

CHAPTER IX.

UNLAWFUL ASSEMBLIES.

127. (1) Any Magistrate or officer in charge of a police-station may command any unlawful assembly, or any assembly of five or more persons likely to cause a disturbance of the public peace, to disperse; and it shall thereupon be the duty of the members of such assembly to disperse accordingly.

Assembly to disperse on command of Magistrate or police-officer.

(2) This section applies also to the police in the towns of Calcutta and Bombay.

128. If, upon being so commanded, any such assembly does not disperse, or if, without being so commanded, it conducts itself in such a manner as to show a determination not to disperse, any Magistrate or officer in charge of a police-station, whether within or without the presidency-towns, may proceed to disperse such assembly by force, and may require the assistance of any male person, not being an officer or soldier in Her Majesty's Army or a volunteer enrolled under the Indian Volunteers Act, XX of 1869, and acting as such, for the purpose of dispersing such assembly, and, if necessary, arresting and confining the persons who form part of it, in order to disperse such assembly, or that they may be punished according to law.

Use of civil force to disperse.

129. If any such assembly cannot be otherwise dispersed, and if it is necessary for the public security that it should be dispersed, the Magistrate of the highest rank, who is present, may cause it to be dispersed by military force.

Use of military force.

130. (1) When a Magistrate determines to disperse any such assembly by military force, he may require any commissioned or non-commissioned officer in command of any soldiers in Her Majesty's Army or of any volunteers enrolled under the Indian Volunteers Act, XX of 1869, to disperse such assembly by military force, and to arrest and confine such persons

Duty of officer commanding troops required by Magistrate to disperse assembly.

forming part of it as the Magistrate may direct, or as it may be necessary to arrest and confine in order to disperse the assembly or to have them punished according to law.

(2) Every such officer shall obey such requisition in such manner as he thinks fit; but in so doing he shall use as little force, and do as little injury to person and property, as may be consistent with dispersing the assembly and arresting and detaining such persons.

131. When the public security is manifestly endangered by any such assembly, and when no Magistrate can be communicated with, any commissioned officer of Her Majesty's Army may disperse such assembly by military force, and may arrest and confine any persons forming part of it, in order to disperse such assembly or that they may be punished according to law; but if, while he is acting under this section, it becomes practicable for him to communicate with a Magistrate, he shall do so, and shall thenceforward obey the instructions of the Magistrate as to whether he shall or shall not continue such action.

132. No prosecution against any person for any act purporting to be done under this chapter shall be instituted in any Criminal Court, except with the sanction of the Governor General in Council; and—

- (a) no Magistrate or police-officer acting under this chapter in good faith,
 - (b) no officer acting under Section 131 in good faith,
 - (c) no person doing any act in good faith, in compliance with a requisition under Section 128 or Section 130, and
 - (d) no inferior officer, or soldier, or volunteer, doing any act in obedience to any order which he was bound to obey,
- shall be deemed to have thereby committed an offence.

CHAPTER X.

PUBLIC NUISANCES.

133. (1) Whenever a District Magistrate, a Subdivisional Magistrate or, when empowered by the Local Government in this behalf, a Magistrate of the first class, considers, on receiving a police-report or other information, and on taking such evidence (if any) as he thinks fit,

that any unlawful obstruction or nuisance should be removed from any way, river or channel which is or may be lawfully used by the public, or from any public place, or

that any trade or occupation, or the keeping of any goods or merchandise, by reason of its being injurious to the health or physical comfort of the community, should be suppressed or removed or prohibited, or

that the construction of any building, or the disposal of any substance as likely to occasion conflagration or explosion, should be prevented or stopped, or

that any building is in such a condition that it is likely to fall and thereby cause injury to persons living or carrying on business in the neighbourhood or passing by, and that in consequence its removal, repair or support is necessary, or

that any tank, well or excavation adjacent to any such way or public place should be fenced in such a manner as to prevent danger arising to the public,

such Magistrate may make a conditional order requiring the person causing such obstruction or nuisance, or carrying on such trade or occupation, or keeping any such goods or merchandise, or owning, possessing or controlling such building, substance, tank, well or excavation, within a time to be fixed in the order,

to remove such obstruction or nuisance ; or

to suppress or remove such trade or occupation ; or

to remove such goods or merchandise ; or

to prevent or stop the construction of such building ; or

to remove, repair or support it ; or

to alter the disposal of such substance ; or

to fence such tank, well or excavation, as the case may be ; or

to appear before himself or some other Magistrate of the first or second class, at a time and place to be fixed by the order, and move to have the order set aside or modified in manner hereinafter provided.

(2) No order duly made by a Magistrate under this section shall be called in question in any Civil Court.

Explanation.—A “ public place ” includes also property belonging to the State, camping-grounds and grounds left unoccupied for sanitary and recreative purposes :

134. (1) The order shall, if practicable, be served on the person Service or notification of against whom it is made, in manner herein provided order. for service of a summons.

(2) If such order cannot be so served, it shall be notified by proclamation, published in such manner as the Local Government may by rule direct, and a copy thereof shall be stuck up at such place or places as may be fittest for conveying the information to such person.

Person to whom order is addressed to obey or show cause or claim jury. 135. The person against whom such order is made, shall—

(a) perform, within the time specified in the order, the act directed thereby ; or

(b) appear in accordance with such order and either show cause against the same, or apply to

the Magistrate by whom it was made to appoint a jury to try whether the same is reasonable and proper.

136. If such person does not perform such act or appear and show cause or apply for the appointment of a jury as required by Section 135, he shall be liable to the penalty prescribed in that behalf in Section 188 of the Indian Penal Code, XLV of 1860, and the order shall be made absolute.

Consequence of his failing to do so.

Procedure where he appears to show cause.

137. (1) If he appears and shows cause against the order, the Magistrate shall take evidence in the matter as in a summons-case.

(2) If the Magistrate is satisfied that the order is not reasonable and proper, no further proceedings shall be taken in the case.

(3) If the Magistrate is not so satisfied, the order shall be made absolute.

Procedure where he claims jury. 138. (1) On receiving an application under Section 135 to appoint a jury, the Magistrate shall—

(a) forthwith appoint a jury consisting of an uneven number of persons not less than five, of whom the foreman and one-half of the remaining members shall be nominated by such Magistrate, and the other members by the applicant;

(b) summon such foreman and members to attend at such place and time as the Magistrate thinks fit; and

(c) fix a time within which they are to return their verdict.

(2) The time so fixed may, for good cause shown, be extended by the Magistrate.

139. (1) If the jury or a majority of the jurors find that the order of the Magistrate is reasonable and proper as originally made, or subject to a modification which the Magistrate accepts, the Magistrate shall make the order absolute subject to such modification (if any).

Procedure where jury finds Magistrate's order to be reasonable.

(2) In other cases, no further proceedings shall be taken under this chapter.

140. (1) When an order has been made absolute under Section 136, Section 137 or Section 139, the Magistrate shall give notice of the same to the person against whom the order was made, and shall further require him to perform the act directed by the order within a time to be fixed in the notice, and inform him that, in case of disobedience, he will be liable to the penalty provided by Section 188 of the Indian Penal Code, XLV of 1860.

Procedure on order being made absolute.

(2) If such act is not performed within the time fixed, the Magistrate may cause it to be performed, and may recover the costs of performing it, either by the sale of any building, goods or other property removed by his order, or by the distress and sale of any other moveable property of such person within or without the local limits of such Magistrate's jurisdiction. If such other property is without such limits, the order shall authorise its attachment and sale when endorsed by the Magistrate within the local limits of whose jurisdiction the property to be attached is found.

Consequences of disobedience to order.

(3) No suit shall lie in respect of anything done in good faith under this section.

141. If the applicant by neglect or otherwise prevents the appointment of the jury, or if from any cause the jury appointed do not return their verdict within the time fixed or within such further time as the Magistrate may in his discretion allow, the Magistrate may pass such order as he thinks fit, and such order shall be executed in the manner provided by Section 140.

Procedure on failure to appoint jury or omission to return verdict.

142. (1) If a Magistrate making an order under Section 133 considers that Injunction pending inquiry. immediate measures should be taken to prevent imminent danger or injury of a serious kind to the public, he may, whether a jury is to be, or has been, appointed or not, issue such an injunction to the person against whom the order was made, as is required to obviate or prevent such danger or injury pending the determination of the matter.

(2) In default of such person forthwith obeying such injunction, the Magistrate may himself use or cause to be used, such means as he thinks fit to obviate such danger or to prevent such injury.

(3) No suit shall lie in respect of anything done in good faith by a Magistrate under this section.

143. A District Magistrate or Subdivisional Magistrate, or any other Magistrate empowered by the Local Government or the District Magistrate in this behalf, may order any person not to repeat or continue a public nuisance, as defined in the Indian Penal Code, XLV of 1860, or any special or local law.

Magistrate may prohibit repetition or continuance of public nuisance.

CHAPTER XI.

TEMPORARY ORDERS IN URGENT CASES OF NUISANCE OR APPREHENDED DANGER.

144. (1) In cases where, in the opinion of a District Magistrate, a Chief Presidency Magistrate, a Subdivisional Magistrate, or of any other Magistrate specially empowered by the Local Government, or the Chief Presidency Magistrate or the District Magistrate to act under this section, immediate prevention or speedy remedy is desirable,

Power to issue order absolute at once in urgent cases of nuisance or apprehended danger.

such Magistrate may, by a written order stating the material facts of the case and served in manner provided by Section 134, direct any person to abstain from a certain act or to take certain order with certain property in his possession or under his management, if such Magistrate considers that such direction is likely to prevent, or tends to prevent, obstruction, annoyance or injury, or risk of obstruction, annoyance or injury, to any person lawfully employed, or danger to human life, health or safety, or a disturbance of the public tranquillity, or a riot, or an affray.

(2) An order under this section may, in cases of emergency or in cases where the circumstances do not admit of the serving in due time of a notice upon the person against whom the order is directed, be passed *ex-parte*.

(3) An order under this section may be directed to a particular individual, or to the public generally when frequenting or visiting a particular place.

(4) Any Magistrate may rescind or alter any order made under this section by himself or any Magistrate subordinate to him or by his predecessor in office.

(5) No order under this section shall remain in force for more than two months from the making thereof; unless, in cases of danger to human life, health or safety, or a likelihood of a riot or an affray, the Local Government, by notification in the official Gazette, otherwise directs.

CHAPTER XII.

DISPUTES AS TO IMMOVEABLE PROPERTY.

145. (1) Whenever a District Magistrate, Subdivisional Magistrate or Magistrate of the first class is satisfied from a police-report or other information that a dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof, within the local limits of his jurisdiction, he shall make an order in writing, stating the grounds of his being so satisfied, and requiring the parties concerned in such dispute to attend his Court in person or by pleader, within a time to be fixed by such Magistrate, and to put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute.

(2) For the purposes of this section the expression "land or water" includes buildings, markets, fisheries, crops or other produce of land, and the rents or profits of any such property.

(3) A copy of the order shall be served in manner provided by this Code for the service of a summons upon such person or persons as the Magistrate may direct, and at least one copy shall be published by being affixed to some conspicuous place at or near the subject of dispute.

(4) The Magistrate shall then, without reference to the merits of the claims of any of such parties to a right to possess the subject of dispute, peruse the statements so put in, hear the parties, receive the evidence produced by them, respectively, consider the effect of such evidence, take such further evidence (if any) as he thinks necessary, and, if possible, decide whether any and which of the parties was at the date of the order before mentioned in such possession of the said subject :

Provided that, if it appears to the Magistrate that any party has within two months next before the date of such order been forcibly and wrongfully dispossessed, he may treat the party so dispossessed as if he had been in possession at such date :

Provided also, that, if the Magistrate considers the case one of emergency, he may at any time attach the subject of dispute, pending his decision under this section.

(5) Nothing in this section shall preclude any party so required to attend or any other person interested, from showing that no such dispute as aforesaid exists or has existed ; and in such case the Magistrate shall cancel his said order, and all further proceedings thereon shall be stayed, but, subject to such cancellation, the order of the Magistrate under sub-section (1) shall be final.

(6) If the Magistrate decides that one of the parties was in such possession of the said subject, he shall issue an order declaring such party to be entitled to possession thereof until evicted therefrom in due course of law, and forbidding all disturbance of such possession until such eviction.

(7) Proceedings under this section shall not abate by reason only of the death of any of the parties thereto.

146. (1) If the Magistrate decides that none of the parties was then in such possession, or is unable to satisfy himself as to which of them was then in such possession of the subject of dispute, he may attach it until a competent Court has determined the rights of the parties thereto, or the person entitled to possession thereof.

(2) When the Magistrate attaches the subject of dispute, he may, if he thinks fit, appoint a receiver thereof, who, subject to the control of the Magistrate, shall have all the powers of a receiver appointed under the Code of Civil Procedure, XIV of 1882.

147. Whenever any such Magistrate is satisfied as aforesaid that a dispute likely to cause a breach of the peace exists concerning the right of use of any land or water (including any right of way or other easement over the same) within the local limits of his jurisdiction, he may inquire into the matter in manner provided by Section 145; and may, if it appears to him that such right exists, make an order permitting such thing to be done, or directing that such thing shall not be done, as the case may be, until the person objecting to such thing being done, or claiming that such thing may be done, obtains the decision of a competent Court adjudging him to be entitled to prevent the doing of, or to do, such thing, as the case may be :

Provided that, no order shall be passed under this section permitting the doing of anything where the right to do such thing is exerciseable at all times of the year, unless such right has been exercised within three months next before the institution of the inquiry; or, where the right is exerciseable only at particular seasons or on particular occasions, unless the right has been exercised during the last of such seasons or occasions before such institution.

148. (1) Whenever a local inquiry is necessary for the purposes of this chapter any District Magistrate or Subdivisional Magistrate may depute any Magistrate subordinate to him to make the inquiry, and may furnish him with such written instructions as may seem necessary for his guidance, and may declare by whom the whole or any part of the necessary expenses of the inquiry shall be paid.

(2) The report of the person so deputed may be read as evidence in the case.

(3) When any costs have been incurred by any party to a proceeding under this chapter for witnesses, or pleaders' fees, or both, the Magistrate passing a decision under Section 145, Section 146 or Section 147 may direct by whom such costs shall be paid, whether by such party or by any other party to the proceeding, and whether in whole or in part or proportion. All costs so directed to be paid may be recovered as if they were fines.

CHAPTER XIII.

PREVENTIVE ACTION OF THE POLICE.

149. Every police-officer may interpose for the purpose of preventing, and shall, to the best of his ability, prevent, the commission of any cognizable offence.

150. Every police-officer receiving information of a design to commit any cognizable offence shall communicate such information to the police-officer to whom he is subordinate, and to any other officer whose duty it is to prevent or take cognizance of the commission of any such offence.

151. A police-officer knowing of a design to commit any cognizable offence may arrest, without orders from a Magistrate and without a warrant, the person so designing, if it appears to such officer that the commission of the offence cannot be otherwise prevented.

152. A police-officer may of his own authority interpose to prevent any injury attempted to be committed in his view to any public property, moveable or immovable, or the removal or injury of any public landmark or buoy or other mark used for navigation.

153. (1) Any officer in charge of a police-station may, without a warrant, enter any place within the limits of such station for the purpose of inspecting or searching for any weights or measures or instruments for weighing, used or kept therein, whenever he has reason to believe that there are in such place any weights, measures or instruments for weighing which are false.

(2) If he finds in such place any weights, measures or instruments for weighing which are false, he may seize the same, and shall forthwith give information of such seizure to a Magistrate having jurisdiction.

PART V.—INFORMATION TO THE POLICE AND THEIR POWERS TO INVESTIGATE.

CHAPTER XIV.

154. Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police-station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the Local Government may prescribe in this behalf.

155. (1) When information is given to an officer in charge of a police-station of the commission within the limits of such station of a non-cognizable offence, he shall enter in a book to be kept as aforesaid the substance of such information, and refer the informant to the Magistrate.

(2) No police-officer shall investigate a non-cognizable case without the order of a Magistrate of the first or second class having power to try such case or commit the same for trial, or of a Presidency Magistrate.

(3) Any police-officer receiving such order may exercise the same powers in respect of the investigation (except the power to arrest without warrant) as an officer in charge of a police-station may exercise in a cognizable case.

156 (1) Any officer in charge of a police-station may, without the order of a Magistrate, investigate any cognizable case which a Court, having jurisdiction over the local area within the limits of such station, would have power to inquire into or try under the provisions of Chapter XV relating to the place of inquiry or trial.

(2) No proceeding of a police-officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.

(3) Any Magistrate empowered under Section 190 may order such an investigation as above mentioned.

157. (1) If, from information received or otherwise, an officer in charge of a police-station has reason to suspect the commission of an offence which he is empowered under Section 156 to investigate, he shall forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence upon a police-report, and shall proceed in person, or shall depute one of his subordinate officers to proceed, to the spot to investigate the facts and circumstances of the case, and to take such measures as may be necessary for the discovery and arrest of the offender :

Procedure where cognizable offence suspected.

(a) when any information as to the commission of any such offence is given against any person by name and the case is not of a serious nature, the officer in charge of a police-station need not proceed in person or depute a subordinate officer to make an investigation on the spot :

(b) if it appear to the officer in charge of a police-station that there is no sufficient ground for entering on an investigation, he shall not investigate the case.

(2) In each of the cases mentioned in clauses (a) and (b) of the proviso to sub-section (1), the officer in charge of the police-station shall state in his said report his reasons for not fully complying with the requirements of that sub-section.

158. (1) Every report sent to a Magistrate under Section 157 shall, if the Local Government so directs, be submitted through such superior officer of police as the Local Government, by general or special order, appoints in that behalf.

(2) Such superior officer may give such instructions to the officer in charge of the police-station as he thinks fit, and shall, after recording such instructions on such report, transmit the same without delay to the Magistrate.

159. Such Magistrate, on receiving such report, may direct an investigation or, if he thinks fit, at once proceed, or depute any Magistrate subordinate to him to proceed, to hold a preliminary inquiry into, or otherwise to dispose of the case in manner provided in this Code.

160. Any police-officer making an investigation under this chapter, may, by order in writing, require the attendance before himself of any person being within the limits of his own or any adjoining station who, from the information given or otherwise, appears to be acquainted with the circumstances of the case ; and such person shall attend as so required.

161 (1) Any police-officer making an investigation under this chapter may examine orally any person supposed to be acquainted with the facts and circumstances of the case.

(2) Such person shall be bound to answer all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.

162. (1) No statement made by any person to a police-officer in the course of an investigation under this chapter shall, if taken down in writing, be signed by the person making it, nor shall such writing be used as evidence:

Statements to police not to be signed or admitted in evidence. Provided that, when any witness is called for the prosecution whose statement has been taken down in writing as aforesaid, the Court shall, on the request of the accused, refer to such writing, and may then, if the Court thinks it expedient in the interests of justice, direct that the accused be furnished with a copy thereof: and such statement may be used to impeach the credit of such witness in manner provided by the Indian Evidence Act, I of 1872.

(2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of Section 32, clause (1), of the Indian Evidence Act I of 1872.

163. (1) No police-officer or person in authority shall offer or make, or cause to be offered or made, any such inducement, threat or promise as is mentioned in the Indian Evidence Act, I of 1872, Section 24.

No inducement to be offered. (2) But no police-officer or other person shall prevent, by any caution or otherwise, any person from making in the course of any investigation under this chapter any statement which he may be disposed to make of his own free will.

164. (1) Every Magistrate not being a police-officer may record any statement or confession made to him in the course of an investigation under this chapter, or at any time afterwards before the commencement of the inquiry or trial.

Power to record statements and confessions. (2) Such statements shall be recorded in such of the manners hereinafter prescribed for recording evidence as is, in his opinion, best fitted for the circumstances of the case. Such confessions shall be recorded and signed in the manner provided in Section 364, and such statements or confessions shall then be forwarded to the Magistrate by whom the case is to be inquired into or tried.

(3) No Magistrate shall record any such confession unless, upon questioning the person making it, he has reason to believe that it was made voluntarily; and, when he records any confession, he shall make a memorandum at the foot of such record to the following effect:—

“I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.

(Signed) A. B.,
Magistrate.”

Explanation.—It is not necessary that the Magistrate receiving and recording a confession or statement should be a Magistrate having jurisdiction in the case.

165. (1) Whenever an officer in charge of a police-station, or a police-officer making an investigation, considers that the production of any document or thing is necessary to the conduct of an investigation into any offence which he is authorised to investigate, and there is reason to believe that a person to whom a summons or order under Section 94 has been or might be issued will not or would not

produce such document or thing according to the directions of the summons or order, or when such document or thing is not known to be in the possession of any person, such officer may search, or cause search to be made, for the same in any place within the limits of the station of which he is in charge, or to which he is attached.

(2) Such officer shall, if practicable, conduct the search in person.

(3) If he is unable to conduct the search in person, and there is no other person competent to make the search present at the time, he may require any officer subordinate to him to make the search, and he shall deliver to such subordinate officer an order in writing, specifying the document or thing for which search is to be made, and the place to be searched; and such subordinate officer may thereupon search for such thing in such place.

(4) The provisions of this Code as to search-warrants shall, so far as may be, apply to a search made under this section.

166. (1) An officer in charge of a police-station may require an officer in charge of another police-station, whether in the same or a different district, to cause a search to be made in any place, in any case in which the former officer might cause such search to be made within the limits of his own station.

(2) Such officer, on being so required, shall proceed according to the provisions of Section 165, and shall forward the thing found, if any, to the officer at whose request the search was made.

167. (1) Whenever it appears that any investigation under this chapter cannot be completed within the period of twenty-four hours fixed by Section 61, and there are grounds for believing that the accusation or information is well-founded, the officer in charge of the police-station shall forthwith transmit to the nearest Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused (if any) to such Magistrate.

(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole. If he has not jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction.

(3) A Magistrate authorising under this section detention in the custody of the police shall record his reasons for so doing.

(4) If such order is given by a Magistrate other than the District Magistrate or Subdivisional Magistrate, he shall forward a copy of his order, with his reason for making it, to the Magistrate to whom he is immediately subordinate.

168. When any subordinate police-officer has made any investigation under this chapter, he shall report the result of such investigation to the officer in charge of the police-station.

Report of investigation
by subordinate police-officer.

169. If, upon an investigation under this chapter, it appears to the officer in charge of the police-station that there is not sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate such officer shall, if such person is in custody, release him on his executing a bond, with or without sureties, as such officer may direct, to appear, if and when so required, before a Magistrate empowered to take cognizance of the offence on a police-report and to try the accused or commit him for trial.

170. (1) If, upon an investigation under this chapter, it appears to the officer in charge of the police-station that there is sufficient evidence or reasonable ground as aforesaid, such officer shall forward the accused under custody to a Magistrate empowered to take cognizance of the offence upon a police-report, and to try the accused or commit him for trial or, if the offence is bailable and the accused is able to give security, shall take security from him for his appearance before such Magistrate on a day fixed and for his attendance from day to day before such Magistrate until otherwise directed.

(2) When the officer in charge of a police-station forwards an accused person to a Magistrate or takes security for his appearance before such Magistrate under this section, he shall send to such Magistrate any weapon or other article which it may be necessary to produce before him, and shall require the complainant (if any), and so many of the persons who appear to such officer to be acquainted with the circumstances of the case as he may think necessary, to execute a bond to appear before the Magistrate as thereby directed and prosecute or give evidence (as the case may be) in the matter of the charge against the accused.

(3) If the Court of the District Magistrate or Subdivisional Magistrate is mentioned in the bond, such Court shall be held to include any Court to which such Magistrate may refer the case for inquiry or trial, provided reasonable notice of such reference is given to such complainant or persons.

(4) The day fixed under this section shall be the day whereon the accused person is to appear, if security for his appearance has been taken, or the day on which he may be expected to arrive at the Court of the Magistrate, if he is to be forwarded in custody.

(5) The officer in whose presence the bond is executed, shall deliver a copy thereof to one of the persons who executed it, and shall then send to the Magistrate the original with his report.

171. No complainant or witness on his way to the Court of the Magistrate shall be required to accompany a police-officer.

Complainants and witnesses not to be required to accompany police-officer.

or shall be subjected to unnecessary restraint or inconvenience, or required to give any security for his appearance other than his own bond :

Complainants and witnesses not to be subjected to restraint.

Provided that, if any complainant or witness refuses to attend or to execute a bond as directed in Section 170, the officer in charge of the police-station may forward him in custody to the Magistrate, who may detain him in custody until he executes such bond, or until the hearing of the case is completed.

Recusant complainant or witness may be forwarded in custody.

172. (1) Every police-officer making an investigation under this chapter shall day by day enter his proceedings in the investigation in a diary, setting forth the time at which the information reached him, the time at which he began and closed his investigation, the place or places visited by him, and a statement of the circumstances ascertained through his investigation.

(2) Any Criminal Court may send for the police diaries of a case under inquiry or trial in such Court, and may use such diaries not as evidence in the case, but to aid it in such inquiry or trial. Neither the accused nor his agents shall be entitled to call for such diaries, nor shall he or they be entitled to see them merely because they are referred to by the Court; but if they are used by the police-officer who made them, to refresh his memory, or if the Court uses them for the purpose of contradicting such police-officer, the provisions of the Indian Evidence Act, I of 1872, Section 161 or Section 145 as the case may be, shall apply.

173. (1) Every investigation under this chapter shall be completed without unnecessary delay, and as soon as it is completed the officer in charge of the police-station shall forward a report of police-officer. the officer in charge of the police-station shall forward to a Magistrate empowered to take cognizance of the offence on a police-report a report in the form prescribed by the Local Government, setting forth the names of the parties, the nature of the information and the names of the persons who appear to be acquainted with the circumstances of the case, and stating whether the accused person has been forwarded in custody, or has been released on his bond, and, if so, whether with or without sureties.

(2) Where a superior officer of police has been appointed under Section 158, the report shall, in any cases in which the Local Government by general or special order so directs, be submitted through that officer, and he may, pending the orders of the Magistrate, direct the officer in charge of the police-station to make further investigation.

(3) Whenever it appears from a report forwarded under this section that the accused has been released on his bond, the Magistrate shall make such order for the discharge of such bond or otherwise as he thinks fit.

274. (1) The officer in charge of a police-station, or some other police-officer specially empowered by the Local Government to inquire and report on suicide, &c. in that behalf on receiving information that a person—

- (a) has committed suicide, or
- (b) has been killed by another, or by an animal or by machinery, or by an accident, or
- (c) has died under circumstances raising a reasonable suspicion that some other person has committed an offence,

shall immediately give intimation thereof to the nearest Magistrate empowered to hold inquests, and unless otherwise directed by any rule prescribed by the Local Government, or by any general or special order of the District or Sub-divisional Magistrate, shall proceed to the place where the body of such deceased person is, and there in the presence of two or more respectable inhabitants of the neighbourhood, shall make an investigation, and draw up a report of the apparent cause of death describing such wounds, fractures, bruises and other marks of injury as may be found on the body, and stating in what manner, or by what weapon or instrument (if any), such marks appear to have been inflicted.

(2) The report shall be signed by such police-officer and other persons, or by so many of them as concur therein, and shall be forthwith forwarded to the District Magistrate or the Subdivisional Magistrate.

(3) When there is any doubt regarding the cause of death, or when for any other reason the police-officer considers it expedient so to do, he shall, subject to such rules as the Local Government may prescribe in this behalf, forward the body, with a view to its being examined, to the nearest Civil Surgeon, or other qualified medical man appointed in this behalf by the Local Government, if the state of the weather and the distance admit of its being so forwarded without risk of such putrefaction on the road as would render such examination useless.

(4) In the Presidencies of Fort St. George and Bombay investigations under this section may be made by the head of the village, who shall then report the result to the nearest Magistrate authorised to hold inquests.

(5) The following Magistrates are empowered to hold inquests, namely, any District Magistrate or Subdivisional Magistrate, and any Magistrate specially empowered in this behalf by the Local Government or the District Magistrate.

175. (1) A police-officer proceeding under Section 174 may, by order in writing, summon two or more persons as aforesaid for the purpose of the said investigation, and any other person who appears to be acquainted with the facts of the case. Every person so summoned shall be bound to attend and to answer truly all questions other than questions the answers to which would have a tendency to expose him to a criminal charge, or to a penalty or forfeiture.

(2) If the facts do not disclose a cognizable offence to which Section 170 applies, such persons shall not be required by the police-officer to attend a Magistrate's Court.

176. (1) When any person dies while in the custody of the police, the nearest Magistrate empowered to hold inquests shall, and, in any other case mentioned in Section 174, clauses (a), (b) and (c) of sub-section (1), any Magistrate so empowered may hold an inquiry into the cause of death, either instead of, or in addition to, the investigation held by the police-officer; and, if he does so, he shall have all the powers in conducting it which he would have in holding an inquiry into an offence. The Magistrate holding such an inquiry shall record the evidence taken by him in connection therewith in any of the manners hereinafter prescribed according to the circumstances of the case.

(2) Whenever such Magistrate considers it expedient to make an examination of the dead body of any person who has been already interred, in order to discover the cause of his death, the Magistrate may cause the body to be disinterred and examined.

PART VI. PROCEEDINGS IN PROSECUTIONS.

CHAPTER XV.

OF THE JURISDICTION OF THE CRIMINAL COURTS IN INQUIRIES AND TRIALS.

A.—Place of Inquiry or Trial.

177. Every offence shall ordinarily be inquired into and tried by a Court within the local limits of whose jurisdiction it was committed.

178. Notwithstanding anything contained in Section 177, the Local Government may direct that any cases or class of cases committed for trial in any district may be tried in any sessions division :

Power to order cases to be tried in different sessions divisions.

Provided that such direction is not repugnant to any direction previously issued by the High Court under Section 15 of the Indian High Courts Act, 1861 (24 & 25 Vict., c. 104), or under this Code, Section 526.

179. When a person is accused of the commission of any offence by reason of anything which has been done, and of any consequence which has ensued, such offence may be inquired into or tried by a Court within the local limits of whose jurisdiction any such thing has been done, or any such consequence has ensued.

Accused triable in district where act is done or where consequence ensues.

Illustrations.

(a) A is wounded within the local limits of the jurisdiction of Court X, and dies within the local limits of the jurisdiction of Court Z. The offence of the culpable homicide of A may be inquired into or tried either by X or Z.

(b) A is wounded within the local limits of the jurisdiction of Court X, and is, during ten days within the local limits of the jurisdiction of Court Y, and during ten days more within the local limits of the jurisdiction of Court Z, unable in the local limits of the jurisdiction of either Court Y or Court Z to follow his ordinary pursuits. The offence of causing grievous hurt to A may be inquired into or tried by X, Y or Z.

(c) A is put in fear of injury within the local limits of the jurisdiction of Court X, and is thereby induced, within the local limits of the jurisdiction of Court Y, to deliver property to the person who put him in fear. The offence of extortion committed on A may be inquired into or tried either by X or Y.

(d) A is wounded in the Native State of Baroda, and dies of his wounds in Poona. The offence of causing A's death may be inquired into and tried in Poona.

180. When an act is an offence by reason of its relation to any other act which is also an offence, or which would be an offence if the doer were capable of committing an offence, a charge of the first-mentioned offence may be inquired into or tried by a Court within the local limits of whose jurisdiction either act was done.

Place of trial where act is offence by reason of relation to other offence.

Illustrations.

(a) A charge of abetment may be inquired into or tried either by the Court within the local limits of whose jurisdiction the abetment was committed, or by the Court within the local limits of whose jurisdiction the offence abetted was committed.

(b) A charge of receiving or retaining stolen goods may be inquired into or tried either by the Court within the local limits of whose jurisdiction the goods were stolen, or by any Court within the local limits of whose jurisdiction any of them were at any time dishonestly received or retained.

(c) A charge of wrongfully concealing a person known to have been kidnapped may be inquired into or tried by the Court within the local limits of whose jurisdiction the wrongful concealing, or by the Court within the local limits of whose jurisdiction the kidnapping, took place.

181. (1) The offence of being a thug, of being a thug and committing murder, of dacoity, of dacoity with murder, of having belonged to a gang of dacoits, or of having escaped from custody, may be inquired into or tried by a Court within the local limits of whose jurisdiction the person charged is.

Being a thug or belonging to a gang of dacoits, escape from custody, etc.

(2) The offence of criminal misappropriation or of criminal breach of trust may be inquired into or tried by a Court within the local limits of whose jurisdiction any part of the property, which is the subject of the offence, was received or retained by the accused person, or the offence was committed.

(3) The offence of stealing anything may be inquired into or tried by a Court within the local limits of whose jurisdiction such thing was stolen or was possessed by the thief or by any person who received or retained the same knowing or having reason to believe it to be stolen.

(4) The offence of kidnapping or abduction may be inquired into or tried by a Court within the local limits of whose jurisdiction the person kidnapped or abducted was kidnapped or abducted, or was conveyed or concealed or detained.

Place of inquiry or trial where scene of offence is uncertain or not in one district only; or where offence is continuing, or consists of several acts.

182. When it is uncertain in which of several local areas an offence was committed, or

where an offence is committed partly in one local area and partly in another, or

where an offence is a continuing one, and continues to be committed in more local areas than one, or

where it consists of several acts done in different local areas,

it may be inquired into or tried by a Court having jurisdiction over any of such local areas.

183. An offence committed whilst the offender is in the course of performing a journey or voyage may be inquired into or tried by a Court through or into the local limits of whose jurisdiction the offender, or the person against whom, or the thing in respect of which, the offence was committed, passed in the course of that journey or voyage.

184. All offences against the provisions of any law for the time being in force relating to Railways, Telegraphs, the Post-office or Arms and Ammunition may be inquired into or tried in a presidency-town, whether the offence is stated to have been committed within such town or not:

Provided that the offender and all the witnesses necessary for his prosecution are to be found within such town.

185. (1) Whenever any doubt arises as to the Court by which any offence should under the preceding provisions of this chapter be inquired into or tried, the High Court, within the local limits of whose appellate criminal jurisdiction the offender actually is, may decide by which Court the offence shall be inquired into or tried.

(2) In Lower Burma, when the offender is an European British subject, the Court of the Recorder of Rangoon, and in all other cases the Court of the Judicial Commissioner, shall, for the purposes of this section, be deemed to be the High Court.

186. (1) When a Presidency Magistrate, a District Magistrate, a Sub-divisional Magistrate, or, if he is specially empowered in this behalf by the Local Government, a Magistrate of the first class, sees reason to believe that any person within the local limits of his jurisdiction has committed without such limits (whether within or without British India) an offence which cannot, under the provisions of Sections 177 to 184 (both inclusive), or any other law for the time being in force, be inquired into or tried within such local limits, but is under some law for the time being in force triable in British India, such Magistrate may inquire into the offence as if it had been committed within such local limits, and compel such person in manner hereinbefore provided to appear before him, and send such person to the Magistrate having jurisdiction to inquire into or try such offence, or, if such offence is bailable, take a bond with or without sureties for his appearance before such Magistrate.

(2) When there are more Magistrates than one having such jurisdiction and the Magistrate acting under this section cannot satisfy himself as to the Magistrate to or before whom such person should be sent or bound to appear, the case shall be reported for the orders of the High Court.

187. (1) If the person has been arrested under a warrant issued under Section 186 by a Magistrate other than a Presidency Magistrate or District Magistrate, such Magistrate shall send the person arrested to the District or Sub-divisional Magistrate to whom he is subordinate, unless the Magistrate having jurisdiction to inquire into or try such offence issues his warrant for the arrest of such person, in which case the person arrested shall be delivered to the police officer executing such warrant, or shall be sent to the Magistrate by whom such warrant was issued.

(2) If the offence which the person arrested is alleged or suspected to have committed is one which may be inquired into or tried by any Criminal Court in the same district other than that of the Magistrate acting under Section 186, such Magistrate shall send such person to such Court.

188. When a Native Indian subject of Her Majesty commits an offence at any place without and beyond the limits of British India, or

when any British subject commits an offence in the territories of any Native Prince or Chief in India, or

(b) when a servant of the Queen (whether a British subject or not) commits an offence in the territories of any Native Prince or Chief in India,

he may be dealt with in respect of such offence as if it had been committed at any place within British India at which he may be found :

Provided that no charge as to any such offence shall be inquired into in British India unless the Political Agent, if there is one, for the territory in which the offence is alleged to have been committed, certifies that, in his opinion, the charge ought to be inquired into in British India ; and where there is no Political Agent, the sanction of the Local Government shall be required :

Provided, also, that any proceedings taken against any person under this section which would be a bar to subsequent proceedings against such person for

the same offence if such offence has been committed in British India shall be a bar to further proceedings against him under the Foreign Jurisdiction and Extradition Act, XXI of 1879, in respect of the same offence in any territory beyond the limits of British India.

189. Whenever any such offence as is referred to in Section 188 is being inquired into or tried, the Local Government may, if it thinks fit, direct that copies of depositions made or exhibits produced before the Political Agent or a judicial officer in or for the territory in which such offence is alleged to have been committed shall be received as evidence by the Court holding such inquiry or trial in any case in which such Court might issue a commission for taking evidence as to the matters to which such depositions or exhibits relate.

Power to direct copies of depositions and exhibits to be received in evidence.

B.—Conditions requisite for Initiation of Proceedings.

190. (1) Except as hereinafter provided, any Presidency Magistrate, District Magistrate or Subdivisional Magistrate, and any other Magistrate specially empowered in this behalf, may take cognizance of any offence—

Cognizance of offences by Magistrates.

- (a) upon receiving a complaint of facts which constitute such offence ;
- (b) upon a police report of such facts ;
- (c) upon information received from any person other than a police officer or upon his own knowledge or suspicion, that such offence has been committed.

(2) The Local Government, or the District Magistrate subject to the general or special orders of the Local Government, may empower any Magistrate to take cognizance under sub-section (1), clause (a) or clause (b), of offences for which he may try or commit for trial.

(3) The Local Government may empower any Magistrate of the first or second class to take cognizance under sub-section (1), clause (c), of offences for which he may try or commit for trial.

191. When a Magistrate takes cognizance of an offence under sub-section (1), clause (c), of the preceding section, the accused shall, before any evidence is taken, be informed that he is entitled to have the case tried by another Court ; and if the accused, or any of the accused if there be more than one, objects to being tried by such Magistrate, the case shall, instead of being tried by such Magistrate, be committed to the Court of Session or transferred to another Magistrate.

Transfer or commitment on application of accused.

192. (1) Any Chief Presidency Magistrate, District Magistrate or Subdivisional Magistrate may transfer any case of which he has taken cognizance, for inquiry or trial, to any Magistrate subordinate to him.

Transfer of cases by Magistrates.

(2) Any District Magistrate may empower any Magistrate of the first class who has taken cognizance of any case, to transfer it for inquiry or trial to any other specified Magistrate in his district who is competent under this Code to try the accused or commit him for trial ; and such Magistrate may dispose of the case accordingly.

193. (1) Except as otherwise expressly provided by this Code or by any other law for the time being in force, no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the accused has been committed to it by a Magistrate duly empowered in that behalf.

(2) Additional Sessions Judges and Assistant Sessions Judges shall try such cases only as the Local Government by general or special order may direct them to try, or, in the case of Assistant Sessions Judges, as the Sessions Judge of the division, by general or special order, may make over to them for trial.

194. (1) The High Court may take cognizance of any offence upon a commitment made to it in manner hereinafter provided.

Nothing herein contained shall be deemed to affect the provisions of any letters patent granted under the Indian High Courts Act, 1861, (24 and 25 Vict., c. 104), or any other provision of this Code.

(2) (a) Notwithstanding anything in this Code contained, the Advocate General may, with the previous sanction of the Governor-General in Council or the Local Government, exhibit to the High Court against persons subject to the jurisdiction of the High Court, informations for all purposes for which Her Majesty's Attorney-General may exhibit informations on behalf of the Crown in the High Court of Justice in England.

(b) Such proceedings may be taken upon every such information as may lawfully be taken in the case of similar informations filed by Her Majesty's Attorney-General so far as the circumstances of the case and the practice and procedure of the said High Court will admit.

(c) All fines, penalties, forfeitures, debts and sums of money recovered or levied under or by virtue of any such information shall belong to the Government of India.

(d) The High Court may make rules for carrying into effect the provisions of this section.

195. (1) No Court shall take cognizance—

(a) of any offence punishable under Sections 172 to 188 (both inclusive) of the Indian Penal Code, XLV of 1860, except with the previous sanction, or on the complaint, of the public servant concerned or of some public servant to whom he is subordinate;

(b) of any offence punishable under Section 193, 194, 195, 196, 199, 200, 205, 206, 207, 208, 209, 210, 211 or 228 of the same Code, when such offence is committed in, or in relation to, any proceeding in any Court, except with the previous sanction, or on the complaint of such Court, or of some other Court to which such Court is subordinate;

(c) of any offence described in Section 463 or punishable under Section 471, 475 or 476 of the same Code, when such offence has been committed by a party to any proceeding in any Court in respect of a document produced or given in evidence in such proceeding, except with the previous sanction, or on the complaint, of such Court, or of some other Court to which such Court is subordinate.

(2) In clauses (b) and (c) of sub-section (1) the term "Court" means a Civil, Revenue or Criminal Court, but does not include a Registrar or Sub-Registrar under the Indian Registration Act, III of 1877.

(3) The provisions of sub-section (1), with reference to the offences named therein, apply also to the abetment of such offences, and attempts to commit them.

(4) The sanction referred to in this section may be expressed in general terms, and need not name the accused person; but it shall, so far as practicable, specify the Court or other place in which, and the occasion on which, the offence was committed.

Nature of sanction necessary.

(5) When sanction is given in respect of any offence referred to in this section, the Court taking cognizance of the case may frame a charge of any other offence so referred to which is disclosed by the facts.

(6) Any sanction given or refused under this section may be revoked or granted by any authority to which the authority giving or refusing it is subordinate; and no sanction shall remain in force for more than six months from the date on which it was given. Provided that the High Court may, for good cause shown, extend the time.

(7) For the purposes of this section every Court shall be deemed to be subordinate only to the Court to which appeals from the former Court ordinarily lie, that is to say—

- (a) where such appeals lie to more than one Court, the Appellate Court of inferior jurisdiction shall be the Court to which such Court shall be deemed to be subordinate;
- (b) where such appeals lie to a Civil and also to a Revenue Court, such Court shall be deemed to be subordinate to the Civil or Revenue Court according to the nature of the case in connection with which the offence is alleged to have been committed;
- (c) where no appeal lies, such Court shall be deemed to be subordinate to the principal Court of original jurisdiction within the local limits of whose jurisdiction such first-mentioned Court is situate.

196. No Court shall take cognizance of any offence punishable under Chapter VI of the Indian Penal Code, XLV of 1860 (except Section 127), or punishable under Section 108A, or Section 153A, or Section 294A or Section 505 of the same Code, unless upon complaint made by order of, or under authority from, the Governor-General in Council, the Local Government, or some officer empowered by the Governor-General in Council in this behalf.

Prosecution for offences against the State.

197. (1) When any Judge, or any public servant not removeable from his office without the sanction of the Government of India or the Local Government, is accused as such Judge or public servant of any offence, no Court shall take cognizance of such offence, except with the previous sanction of the Government having power to order his removal, or of some officer empowered in this behalf by such Government, or of some Court or other authority to which such Judge or public servant is subordinate, and whose power to give such sanction has not been limited by such Government.

Prosecution of Judges and public servants.

(2) Such Government may determine the person by whom, the manner in which, the offence or offences for which, the prosecution of such Judge or public servant is to be conducted, and may specify the Court before which the trial is to be held.

Power of Government as to prosecution.

198. No Court shall take cognizance of an offence falling under Chapter XIX or Chapter XXI of the Indian Penal Code, XLV of 1860, or under Sections 493 to 496 (both inclusive) of the same Code, except upon a complaint made by some person aggrieved by such offence.

Prosecution for breach of contract, defamation and offences against marriage.

199. No Court shall take cognizance of an offence under Section 497 or Section 498 of the Indian Penal Code, XLV of 1860, except upon a complaint made by the husband of the woman, or, in his absence, by some person who had care of such woman on his behalf at the time when such offence was committed.

Prosecution for adultery or enticing a married woman.

CHAPTER XVI.

OF COMPLAINTS TO MAGISTRATES.

200. Subject to the provisions of Section 476, a Magistrate taking cognizance of an offence on complaint shall at once examine the complainant upon oath, and the substance of the examination shall be reduced to writing and shall be signed by the complainant and also by the Magistrate:

Examination of complainant.

Provided as follows:—

- (a) when the complaint is made in writing, nothing herein contained shall be deemed to require a Magistrate to examine the complainant before transferring the case under Section 192;
- (b) where the Magistrate is a Presidency Magistrate, such examination may be on oath or not as the Magistrate in each case thinks fit, and need not be reduced to writing; but the Magistrate may, if he thinks fit, before the matter of the complaint is brought before him, require it to be reduced to writing;
- (c) when the case has been transferred under Section 192 and the Magistrate so transferring it has already examined the complainant, the Magistrate to whom it is so transferred shall not be bound to re-examine the complainant.

Procedure by Magistrate not competent to take cognizance of the case.

201. (1) If the complaint has been made in writing to a Magistrate who is not competent to take cognizance of the case, he shall return the complaint for presentation to the proper Court with an endorsement to that effect.

(2) If the complaint has not been made in writing, such Magistrate shall direct the complainant to the proper Court.

202. (1) If the Chief Presidency Magistrate, or any other Presidency Magistrate whom the Local Government may from time to time authorise in this behalf, or any Magistrate of the first or second class, is not satisfied as to

Postponement of issue of process.

the truth of a complaint of an offence of which he is authorised to take cognizance, he may, when the complainant has been examined, record his reasons, and may then postpone the issue of process for compelling the attendance of the person complained against, and either inquire into the case himself or direct a previous local investigation to be made by any officer subordinate to such Magistrate, or by a police officer, or by such other person, not being a Magistrate or police officer, as he thinks fit, for the purpose of ascertaining the truth or falsehood of the complaint.

(2) If such investigation is made by some person not being a Magistrate or a police officer, he shall exercise all the powers conferred by this Code on an officer in charge of a police station, except that he shall not have power to arrest without warrant.

(3) This section applies also to the police in the towns of Calcutta and Bombay.

203. The Magistrate before whom a complaint is made or to whom it has been transferred, may dismiss the complaint, if, after examining the complainant and considering the result of the investigation (if any) made under Section 202, there is in his judgment no sufficient ground for proceeding. In such case he shall briefly record his reasons for so doing.

CHAPTER XVII.

OF THE COMMENCEMENT OF PROCEEDINGS BEFORE MAGISTRATES.

204. (1) If, in the opinion of a Magistrate taking cognizance of an offence, there is sufficient ground for proceeding, and the case appears to be one in which, according to the fourth column of the second schedule, a summons should issue in the first instance, he shall issue his summons for the attendance of the accused. If the case appears to be one in which, according to that column, a warrant should issue in the first instance, he may issue a warrant, or, if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or (if he has not jurisdiction himself) some other Magistrate having jurisdiction.

(2) Nothing in this section shall be deemed to affect the provisions of Section 90.

(3) When by any law for the time being in force any process-fees or other fees are payable, no process shall be issued until the fees are paid, and, if such fees are not paid within a reasonable time, the Magistrate may dismiss the complaint.

205. (1) Whenever a Magistrate issues a summons, he may, if he sees reason so to do, dispense with the personal attendance of the accused, and permit him to appear by his pleader.

(2) But the Magistrate inquiring into or trying the case may, in his discretion, at any stage of the proceedings, direct the personal attendance of the accused, and, if necessary, enforce such attendance in manner hereinbefore provided.

CHAPTER XVIII.

OF INQUIRY INTO CASES TRIABLE BY THE COURT OF SESSION OR HIGH COURT.

206. (1) Subject to the provisions of Section 443, any Presidency Magistrate, District Magistrate, Subdivisional Magistrate or Magistrate of the first class, or any Magistrate empowered in this behalf by the Local Government, may commit any person for trial to the Court of Session or High Court for any offence triable by such Court.

(2) But, save as herein otherwise provided, no person triable by the Court of Session shall be committed for trial to the High Court.

207. The following procedure shall be adopted in inquiries before Magistrates where the case is triable exclusively by a Court of Session or High Court, or, in the opinion of the Magistrate, ought to be tried by such Court.

208. (1) The Magistrate shall, when the accused appears or is brought before him, proceed to hear the complainant (if any), and take in manner hereinafter provided all such evidence as may be produced in support of the prosecution or in behalf of the accused, or as may be called for by the Magistrate.

(2) The accused shall be at liberty to cross-examine the witnesses for the prosecution, and in such case the prosecutor may re-examine them.

(3) If the complainant or officer conducting the prosecution, or the accused, applies to the Magistrate to issue process to compel the attendance of any witness or the production of any document or thing, the Magistrate shall issue such process unless, for reasons to be recorded, he deems it unnecessary to do so.

(4) Nothing in this section shall be deemed to require a Presidency Magistrate to record his reasons.

209. (1) When the evidence referred to in Section 208, sub-sections (1) and (3), has been taken, and he has (if necessary) examined the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him, such Magistrate shall, if he finds that there are not sufficient grounds for committing the accused person for trial, record his reasons and discharge him, unless it appears to the Magistrate that such person should be tried before himself or some other Magistrate, in which case he shall proceed accordingly.

(2) Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless.

210. (1) When, upon such evidence being taken and such examination (if any) being made, the Magistrate is satisfied that there are sufficient grounds for committing the accused for trial, he shall frame a charge under his hand, declaring with what offence the accused is charged.

(2) As soon as the charge has been framed, it shall be read and explained to the accused, and a copy thereof shall, if he so requires, be given to him free of cost.

211. (1) The accused shall be required at once to give in, orally or in writing, a list of the persons (if any) whom he wishes to be summoned to give evidence on his trial.

List of witnesses for defence on trial.

(2) The Magistrate may, in his discretion, allow the accused to give in any further list of witnesses at a subsequent time; and, where the accused is committed for trial before the High Court, nothing in this section shall be deemed to preclude the accused from giving, at any time before his trial, to the Clerk of the Crown a further list of the persons whom he wishes to be summoned to give evidence on such trial.

212. The Magistrate may, in his discretion, summon and examine any witness named in any list given in to him under Section 211.

Power of Magistrate to examine such witnesses.

213. (1) When the accused, on being required to give in a list under Section 211, has declined to do so, or when he has given in such list and the witnesses (if any) included therein whom the Magistrate desires to examine have been summoned and examined under Section 212, the Magistrate may make an order committing the accused for trial by the High Court or the Court of Session (as the case may be), and (unless the Magistrate is a Presidency Magistrate) shall also record briefly the reasons for such commitment.

Order of commitment.

(2) If the Magistrate, after hearing the witnesses for the defence, is satisfied that there are not sufficient grounds for committing the accused, he may cancel the charge and discharge the accused.

214. If any person (not being an European British subject) is accused before a Magistrate other than a Presidency Magistrate of having committed an offence conjointly with an European British subject who is about to be committed for trial, or to be tried, before the High Court on a similar charge arising out of the same transaction, and the Magistrate finds that there are sufficient grounds for committing the accused for trial, he shall commit him for trial before the High Court, and not before the Court of Session.

Person charged outside presidency-towns jointly with European British subject.

215. A commitment once made under Section 213 or Section 214 by a competent Magistrate or by a Court of Session under Section 477, or by a Civil or Revenue Court under Section 478, can be quashed by the High Court only and only on a point of law.

Quashing commitments under Section 213 or 214.

216. When the accused has given in any list of witnesses under Section 211 and has been committed for trial, the Magistrate shall summon such of the witnesses included in the list, as have not appeared before himself, to appear before the Court to which the accused has been committed :

Summons to witnesses for defence when accused is committed.

Provided that, where the accused has been committed to the High Court, the Magistrate may, in his discretion, leave such witnesses to be summoned by the Clerk of the Crown, and such witnesses may be summoned accordingly :

Provided, also, that, if the Magistrate thinks that any witness is included in the list for the purpose of vexation or delay, or of defeating the ends of justice, the Magistrate may require the accused to satisfy him that there are reasonable grounds for believing that the evidence of such witness is material, and, if he is not so satisfied, may refuse to summon

Refusal to summon unnecessary witness unless deposit made.

the witness (recording his reasons for such refusal), or may before summoning him require such sum to be deposited as such Magistrate thinks necessary to defray the expense of obtaining the attendance of the witness and all other proper expenses.

217. (1) Complainants and witnesses for the prosecution and defence whose attendance before the Court of Session or High Court is necessary, and who appear before the Magistrate, shall execute before him bonds binding themselves to be in attendance when called upon at the Court of Session or High Court to prosecute or to give evidence, as the case may be.

(2) If any complainant or witness refuses to attend before the Court of Session or High Court, or execute the bond above directed, the Magistrate may detain him in custody until he executes such bond, or until his attendance at the Court of Session or High Court is required, when the Magistrate shall send him in custody to the Court of Session or High Court, as the case may be.

218. (1) When the accused is committed for trial, the Magistrate shall issue an order to such person as may be appointed by the Local Government in this behalf, notifying the commitment, and stating the offence in the same form as the charge, unless the Magistrate is satisfied that such person is already aware of the commitment and the form of the charge;

and shall send the charge, the record of the inquiry and any weapon or other thing which is to be produced in evidence, to the Court of Session or (where the commitment is made to the High Court) to the Clerk of the Crown or other officer appointed in this behalf by the High Court.

(2) When the commitment is made to the High Court and any part of the record is not in English, an English translation of such part shall be forwarded with the record.

219. (1) The Magistrate may, if he thinks fit, summon and examine supplementary witnesses after the commitment and before the commencement of the trial, and bind them over in manner hereinbefore provided to appear and give evidence.

(2) Such examination shall, if possible, be taken in the presence of the accused, and, where the Magistrate is not a Presidency Magistrate, a copy of the evidence of such witnesses shall, if the accused so require, be given to him free of cost.

220. Until and during the trial, the Magistrate shall, subject to the provisions of this Code regarding the taking of bail, commit the accused by warrant to custody.

CHAPTER XIX.

OF THE CHARGE.

Form of Charges.

221. (1) Every charge under this Code shall state the offence with which the accused is charged.

(2) If the law which creates the offence gives it any specific name, the offence may be described in the charge by that name only.
 Specific name of offence sufficient description.

(3) If the law which creates the offence does not give it any specific name, so much of the definition of the offence must be stated as to give the accused notice of the matter with which he is charged.
 How stated where offence has no specific name.

(4) The law and section of the law against which the offence is said to have been committed shall be mentioned in the charge.

(5) The fact that the charge is made is equivalent to a statement that every legal condition required by law to constitute the offence charged was fulfilled in the particular case.
 What implied in charge.

(6) In the presidency-towns the charge shall be written in English; elsewhere it shall be written either in English or in the language of the Court.
 Language of charge.

(7) If the accused has been previously convicted of any offence, and it is intended to prove such previous conviction for the purpose of affecting the punishment which the Court is competent to award, the fact, date and place of the previous conviction shall be stated in the charge. If such statement is omitted, the Court may add it at any time before sentence is passed.
 Previous conviction when to be set out.

Illustrations.

(a) A is charged with the murder of B. This is equivalent to a statement that A's act fell within the definition of murder given in Sections 299 and 300 of the Indian Penal Code, XLV of 1860; that it did not fall within any of the general exceptions of the same Code; and that it did not fall within any of the five exceptions to Section 300, or that, if it did fall within Exception I, one or other of the three provisos to that exception applied to it.

(b) A is charged under Section 325 of the Indian Penal Code, XLV of 1860, with voluntarily causing grievous hurt to B by means of an instrument for shooting. This is equivalent to a statement that the case was not provided for by Section 335 of the Indian Penal Code, XLV of 1860, and that the general exceptions did not apply to it.

(c) A is accused of murder, cheating, theft, extortion, adultery or criminal intimidation, or using a false property-mark. The charge may state that A committed murder, or cheating, or theft, or extortion, or adultery, or criminal intimidation, or that he used a false property-mark, without reference to the definitions of those crimes contained in the Indian Penal Code, XLV of 1860, but the sections under which the offence is punishable must, in each instance, be referred to in the charge.

(d) A is charged, under Section 184 of the Indian Penal Code, XLV of 1860, with intentionally obstructing a sale of property offered for sale by the lawful authority of a public servant. The charge should be in those words.

222. (1) The charge shall contain such particulars as to the time and place of the alleged offence, and the person (if any) against whom, or the thing (if any) in respect of which, it was committed, as are reasonably sufficient to give the accused notice of the matter with which he is charged.
 Particulars as to time, place and person.

(2) When the accused is charged with criminal breach of trust or dishonest misappropriation of money, it shall be sufficient to specify the gross sum in respect of which the offence is alleged to have been committed, and the dates between which the offence is alleged to have been committed, without specifying particular items or exact dates, and the charge so framed shall be deemed to be a charge of one offence within the meaning of Section 234:

Provided that the time included between the first and last of such dates shall not exceed one year.

223. When the nature of the case is such that the particulars mentioned in Sections 221 and 222 do not give the accused sufficient notice of the matter with which he is charged, the charge shall also contain such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose.

When manner of committing offence must be stated.

Illustrations.

(a) A is accused of the theft of a certain article at a certain time and place. The charge need not set out the manner in which the theft was effected.

(b) A is accused of cheating B at a given time and place. The charge must set out the manner in which A cheated B.

(c) A is accused of giving false evidence at a given time and place. The charge must set out that portion of the evidence given by A which is alleged to be false.

(d) A is accused of obstructing B, a public servant, in the discharge of his public functions at a given time and place. The charge must set out the manner in which A obstructed B in the discharge of his functions.

(e) A is accused of the murder of B at a given time and place. The charge need not state the manner in which A murdered B.

(f) A is accused of disobeying a direction of the law with intent to save B from punishment. The charge must set out the disobedience charged and the law infringed.

224. In every charge words used in describing an offence shall be deemed to have been used in the sense attached to them respectively by the law under which such offence is punishable.

Words in charge taken in sense of law under which offence is punishable.

225. No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars, shall be regarded at any stage of the case as material, unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice.

Effect of errors.

Illustrations.

(a) A is charged, under Section 242 of the Indian Penal Code, XLV of 1860, with "having been in possession of counterfeit coin, having known at the time when he became possessed thereof that such coin was counterfeit," the word "fraudulently" being omitted in the charge. Unless it appears that A was in fact misled by this omission, the error shall not be regarded as material.

(b) A is charged with cheating B, and the manner in which he cheated B is not set out in the charge, or is set out incorrectly. A defends himself, calls witnesses, and gives his own account of the transaction. The Court may infer from this that the omission to set out the manner of the cheating is not material.

(c) A is charged with cheating B, and the manner in which he cheated B is not set out in the charge. There were many transactions between A and B, and A had no means of knowing to which of them the charge referred, and offered no defence. The Court may infer from such facts that the omission to set out the manner of the cheating was, in this case, a material error.

(d) A is charged with the murder of Khuda Bakhsh on the 21st January, 1882. In fact, the murdered person's name was Haidar Bakhsh, and the date of the murder was the 20th January 1882. A was never charged with any murder but one, and had heard the inquiry before the Magistrate, which referred exclusively to the case of Haidar Bakhsh. The Court may infer from these facts that A was not misled, and that the error in the charge was immaterial.

(e) A was charged with murdering Haidar Bakhsh on the 20th January, 1882, and Khuda Bakhsh (who tried to arrest him for that murder) on the 21st January, 1882. When charged for the murder of Haidar Bakhsh, he was tried for the murder of Khuda Bakhsh. The witnesses present in his defence were witnesses in the case of Haidar Bakhsh. The Court may infer from this that A was misled and that the error was material.

226. When any person is committed for trial without a charge, or with an imperfect or erroneous charge, the Court or, in the case of a High Court, the Clerk of the Crown, may frame a charge, or add to or otherwise alter the charge, as the case may be, having regard to the rules contained in this Code as to the form of charges.

Procedure on commitment without charge or with imperfect charge.

Illustrations.

1. A is charged with the murder of C. A charge of abetting the murder of C may be added or substituted.

2. A is charged with forging a valuable security under Section 467 of the Indian Penal Code, XLV of 1860. A charge of fabricating false evidence under Section 193 may be added.

3. A is charged with receiving stolen property knowing it to be stolen. During the trial it incidentally appears that he has in his possession instruments for the purpose of counterfeiting coin. A charge under Section 235 of the Indian Penal Code cannot be added.

227. (1) Any Court may alter or add to any charge at any time before judgment is pronounced, or in the case of trials before the Court of Session or High Court, before the verdict of the jury is returned or the opinions of the assessors are expressed.

Court may alter charge.

(2) Every such alteration or addition shall be read and explained to the accused.

228. If the charge framed or alteration or addition made under Section 226 or Section 227 is such that proceeding immediately with the trial is not likely, in the opinion of the Court, to prejudice the accused in his defence or the prosecutor in the conduct of the case, the Court may, in its discretion, after such charge or alteration or addition has been framed or made, proceed with the trial as if the new or altered charge had been the original charge.

When trial may proceed immediately after alteration.

229. If the new or altered or added charge is such that proceeding immediately with the trial is likely, in the opinion of the Court, to prejudice the accused or the prosecutor as aforesaid, the Court may either direct a new trial or adjourn the trial for such period as may be necessary.

When new trial may be directed, or trial suspended.

230. If the offence stated in the new or altered or added charge is one for the prosecution of which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained, unless sanction has been already obtained for a prosecution on the same facts as those on which the new or altered charge is founded.

Stay of proceedings if prosecution of offence in altered charge require previous sanction.

231. Whenever a charge is altered or added to by the Court after the commencement of the trial, the prosecutor and the accused shall be allowed to re-call or re-summon, and examine with reference to such alteration or addition any witness who may have been examined, and also to call any further witness whom the Court may think to be material.

Re-call of witnesses when charge altered.

232. (1) If any Appellate Court, or the High Court in the exercise of its powers of revision or of its powers under Chapter XXVII, is of opinion that any person convicted of an offence was misled in his defence by the absence of a charge or by an error in the charge, it shall direct a new trial to be had upon a charge framed in whatever manner it thinks fit.

(2) If the Court, is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts proved, it shall quash the conviction.

Illustration.

A is convicted of an offence, under Section 196 of the Indian Penal Code, XLV of 1860, upon a charge which omits to state that he knew the evidence, which he corruptly used or attempted to use as true or genuine, was false or fabricated. If the Court thinks it probable that A had such knowledge, and that he was misled in his defence by the omission from the charge of the statement that he had it, it shall direct a new trial upon an amended charge; but, if it appears probable from the proceedings that A had no such knowledge, it shall quash the conviction.

Joinder of Charges.

233. For every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately, except in the cases mentioned in Sections 234, 235, 236 and 239.

Illustration.

A is accused of a theft on one occasion, and of causing grievous hurt on another occasion. A must be separately charged and separately tried for the theft and causing grievous hurt.

234. (1) When a person is accused of more offences than one of the same kind committed within the space of twelve months from the first to the last of such offences, he may be charged with, and tried at one trial for, any number of them not exceeding three.

Three offences of same kind within year may be charged together.

(2) Offences are of the same kind when they are punishable with the same amount of punishment under the same section of the Indian Penal Code, XLV of 1860, or of any special or local law.

235. (1) If, in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with, and tried at one trial for, every such offence.

Trial for more than one offence.

(2) If the acts alleged constitute an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, the person accused of them may be charged with, and tried at one trial for, each of such offences.

Offence falling within two definitions.

(3) If several acts, of which one or more than one would by itself or themselves constitute an offence, constitute when combined a different offence, the person accused of them may be charged with, and tried at one trial for, the offence constituted by such acts when combined, and for any offence constituted by any one, or more, of such acts.

Acts constituting one offence, but constituting when combined a different offence.

(4) Nothing contained in this section shall affect the Indian Penal Code, XLV of 1860, Section 71.

*Illustrations.**to sub-section (1)—*

(a) A rescues B, a person in lawful custody, and in so doing causes grievous hurt to C, a constable in whose custody B was. A may be charged with, and convicted of, offences under Sections 225 and 333 of the Indian Penal Code, XLV of 1860.

(b) A commits house-breaking by day with intent to commit adultery, and commits, in the house so entered, adultery with B's wife. A may be separately charged with, and convicted of, offences under Sections 454 and 497 of the Indian Penal Code, XLV of 1860.

(c) A entices B, the wife of C, away from C, with intent to commit adultery with B, and then commits adultery with her. A may be separately charged with, and convicted of, offences under Sections 493 and 497 of the Indian Penal Code.

(d) A has in his possession several seals, knowing them to be counterfeit and intending to use them for the purpose of committing several forgeries punishable under Section 466 of the Indian Penal Code, XLV of 1860. A may be separately charged with, and convicted of the possession of each seal under Section 473 of the Indian Penal Code.

(e) With intent to cause injury to B, A institutes a criminal proceeding against him, knowing that there is no just or lawful ground for such proceeding; and also falsely accuses B of having committed an offence, knowing that there is no just or lawful ground for such charges. A may be separately charged with, and convicted of, two offences under Section 211 of the Indian Penal Code, XLV of 1860.

(f) A, with intent to cause injury to B, falsely accuses him of having committed an offence, knowing that there is no just or lawful ground for such charge. On the trial, A gives false evidence against B, intending thereby to cause B to be convicted of a capital offence. A may be separately charged with, and convicted of, offences under Sections 211 and 194 of the Indian Penal Code, XLV of 1860.

(g) A, with six others, commits the offences of rioting, grievous hurt and assaulting a public servant endeavouring in the discharge of his duty as such to suppress the riot. A may be separately charged with, and convicted of, offences under Sections 147, 325 and 152 of the Indian Penal Code, XLV of 1860.

(h) A threatens B, C and D at the same time with injury to their persons, with intent to cause alarm to them. A may be separately charged with, and convicted of, each of the three offences under Section 506 of the Indian Penal Code, XLV of 1860.

The separate charges referred to in Illustrations (a) to (h) respectively may be tried at the same time.

to sub-section (2)—

(i) A wrongfully strikes B with a cane. A may be separately charged with, and convicted of, offences under Sections 352 and 323 of the Indian Penal Code, XLV of 1860.

(j) Several stolen sacks of corn are made over to A and B, who know they are stolen property, for the purpose of concealing them. A and B thereupon voluntarily assist each other to conceal the sacks at the bottom of a grain-pit. A and B may be separately charged with, and convicted of, offences under Sections 411 and 414 of the Indian Penal Code, XLV of 1860.

(k) A exposes her child with the knowledge that she is thereby likely to cause its death. The child dies in consequence of such exposure. A may be separately charged with, and convicted of, offences under Sections 317 and 304 of the Indian Penal Code, XLV of 1860.

(l) A dishonestly uses a forged document as genuine evidence, in order to convict B, a public servant, of an offence under Section 167 of the Indian Penal Code, XLV of 1860. A may be separately charged with, and convicted of, offences under Sections 471 (read with 466) and 196 of the same Code.

to sub-section (3)—

(m) A commits robbery on B, and in doing so voluntarily causes hurt to him. A may be separately charged with, and convicted of, offences under Sections 323, 392, and 394 of the Indian Penal Code, XLV of 1860.

236. If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once; or he may be charged in the alternative with having committed some one of the said offence.

Illustrations.

(a) A is accused of an act which may amount to theft, or receiving stolen property, or criminal breach of trust or cheating. He may be charged with theft, receiving stolen property, criminal breach of trust and cheating, or he may be charged with having committed theft, or receiving stolen property, or criminal breach of trust or cheating.

(b) A states on oath before the Magistrate that he saw B hit C with a club. Before the Sessions Court A states on oath that B never hit C. A may be charged in the alternative and convicted of intentionally giving false evidence, although it cannot be proved which of these contradictory statements was false.

237. (1) If, in the case mentioned in Section 236, the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed, although he was not charged with it.

(2) When the accused is charged with an offence, he may be convicted of having attempted to commit that offence, although the attempt is not separately charged.

Illustration.

A is charged with theft. It appears that he committed the offence of criminal breach of trust, or that of receiving stolen goods. He may be convicted of criminal breach of trust, or of receiving stolen goods (as the case may be), though he was not charged with such offence.

238. (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence, though he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it.

(3) Nothing in this section shall be deemed to authorise a conviction of any offence referred to in Section 198 or Section 199 when no complaint has been made as required by that section.

Illustrations.

(a) A is charged, under Section 407 of the Indian Penal Code, XLV of 1860, with criminal breach of trust in respect of property entrusted to him as a carrier. It appears that he did commit criminal breach of trust under Section 406 in respect of the property, but that it was not entrusted to him as a carrier. He may be convicted of criminal breach of trust under Section 406.

(b) A is charged, under Section 325 of the Indian Penal Code, XLV of 1860, with causing grievous hurt. He proves that he acted on grave and sudden provocation. He may be convicted under Section 335 of that Code.

239. When more persons than one are accused of the same offence or of different offences committed in the same transaction, or when one person is accused of committing any offence, and another of abetment of, or attempt to

What persons may be charged jointly.

commit, such offence, they may be charged and tried together or separately, as the Court thinks fit; and the provisions contained in the former part of this chapter shall apply to all such charges.

Illustrations.

(a) A and B are accused of the same murder. A and B may be charged and tried together for the murder.

(b) A and B are accused of a robbery, in the course of which A commits a murder with which B has nothing to do. A and B may be tried together on a charge, charging both of them with the robbery, and A alone with the murder.

(c) A and B are both charged with a theft, and B is charged with two other thefts committed by him in the course of the same transaction. A and B may be both tried together on a charge, charging both with the one theft, and B alone with the two other thefts.

240. When a charge containing more heads than one is framed against the same person, and when a conviction has been had on one or more of them, the complainant, or the officer conducting the prosecution, may, with the consent of the Court, withdraw the remaining charge or charges, or the Court of its own accord may stay the inquiry into, or trial of, such charge or charges. Such withdrawal shall have the effect of an acquittal on such charge or charges, unless the conviction be set aside, in which case the said Court (subject to the order of the Court setting aside the conviction) may proceed with the inquiry into or trial of the charge or charges so withdrawn.

CHAPTER XX.

OF THE TRIAL OF SUMMONS-CASES BY MAGISTRATES.

241. The following procedure shall be observed by Magistrates in the trial of summons-cases.

242. When the accused appears or is brought before the Magistrate, the particulars of the offence of which he is accused shall be stated to him, and he shall be asked if he has any cause to show why he should not be convicted; but it shall not be necessary to frame a formal charge.

243. If the accused admits that he has committed the offence of which he is accused, his admission shall be recorded as nearly as possible in the words used by him; and, if he shows no sufficient cause why he should not be convicted, the Magistrate shall convict him accordingly.

244. (1) If the accused does not make such admission, the Magistrate shall proceed to hear the complainant (if any), and take all such evidence as may be produced in support of the prosecution, and also to hear the accused and take all such evidence as he produces in his defence.

(2) The Magistrate may, if he thinks fit, on the application of the complainant or accused, issue process to compel the attendance of any witness or the production of any document or other thing.

(3) The Magistrate may, before summoning any witness on such application, require that his reasonable expenses, incurred in attending for the purposes of the trial, be deposited in Court.

245. (1) If the Magistrate upon taking the evidence referred to in Section 244, and such further evidence (if any) as he may, of his own motion, cause to be produced, and (if he thinks fit) examining the accused, finds the accused not guilty, he shall record an order of acquittal.

(2) If he finds the accused guilty, he shall pass sentence upon him according to law.

246. A Magistrate may, under Section 243 or Section 245, convict the accused of any offence triable under this chapter which from the facts admitted or proved he appears to have committed, whatever may be the nature of the complaint or summons.

247. If the summons has been issued on complaint, and upon the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall, notwithstanding anything hereinbefore contained, acquit the accused, unless for some reason he thinks proper to adjourn the hearing of the case to some other day:

Provided that, where the complainant is a public servant and his personal attendance is not required, the Magistrate may dispense with his attendance, and proceed with the case.

248. If a complainant, at any time before a final order is passed in any case under this chapter, satisfies the Magistrate that there are sufficient grounds for permitting him to withdraw his complaint, the Magistrate may permit him to withdraw the same, and shall thereupon acquit the accused.

249. In any case instituted otherwise than upon complaint, a Presidency Magistrate, a Magistrate of the 1st class, or, with the previous sanction of the District Magistrate, any other Magistrate, may, for reasons to be recorded by him, stop the proceedings at any stage without pronouncing any judgment either of acquittal or conviction, and may thereupon release the accused.

Frivolous Accusations in Summons and Warrant-cases.

250. (1) If, in any case instituted by complaint as defined in this Code, or upon information given to a police-officer or to a Magistrate, a person is accused before a Magistrate of any offence triable by a Magistrate, and the Magistrate by whom the case is heard discharges or acquits the accused, and is satisfied that the accusation against him was frivolous or vexatious, the Magistrate may, in his discretion, by his order of discharge or acquittal, direct the person upon whose complaint or information the accusation was made to pay to the accused, or to each of the accused where there are more than one, such compensation, not exceeding fifty rupees, as the Magistrate thinks fit:

Provided that, before making any such direction, the Magistrate shall—

(a) record and consider any objection which the complainant or informant may urge against the making of the direction, and

(b) if the Magistrate directs any compensation to be paid, state in writing, in his order of discharge or acquittal, his reasons for awarding the compensation.

(2) Compensation of which a Magistrate has ordered payment under sub-section (1) shall be recoverable as if it were a fine :

Provided that, if it cannot be recovered, the imprisonment to be awarded shall be simple, and for such term, not exceeding thirty days, as the Magistrate directs.

(3) A complainant or informant who has been ordered under sub-section (1) by a Magistrate of the second or third class to pay compensation to an accused person may appeal from the order, in so far as the order relates to the payment of the compensation, as if such complainant or informant had been convicted on a trial held by such Magistrate.

(4) Where an order for payment of compensation to an accused person is made in a case which is subject to appeal under sub-section (3), the compensation shall not be paid to him before the period allowed for the presentation of the appeal has elapsed, or, if an appeal is presented, before the appeal has been decided.

(5) At the time of awarding compensation in any subsequent civil suit relating to the same matter, the Court shall take into account any compensation paid or recovered under this section.

CHAPTER XXI.

OF THE TRIAL OF WARRANT-CASES BY MAGISTRATES.

Procedure in warrant-cases.

251. The following procedure shall be observed by Magistrates in the trial of warrant-cases.

252. (1) When the accused appears or is brought before a Magistrate, such Magistrate shall proceed to hear the complainant (if any) and take all such evidence as may be produced in support of the prosecution.

(2) The Magistrate shall ascertain, from the complainant or otherwise, the names of any persons likely to be acquainted with the facts of the case and to be able to give evidence for the prosecution, and shall summon to give evidence before himself such of them as he thinks necessary.

253. (1) If, upon taking all the evidence referred to in Section 252, and making such examination (if any) of the accused as the Magistrate thinks necessary, he finds that no case against the accused has been made out which, if un rebutted, would warrant his conviction, the Magistrate shall discharge him.

(2) Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless.

254. If, when such evidence and examination have been taken and made, or at any previous stage of the case, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this chapter, which such Magistrate is competent to try, and which, in his opinion, could be adequately punished by him, he shall frame in writing a charge against the accused.

255. (1) The charge shall then be read and explained to the accused, and he shall be asked whether he is guilty or has any defence to make.

Flea.

(2) If the accused pleads guilty, the Magistrate shall record the plea, and may in his discretion convict him thereon.

256. (1) If the accused refuses to plead, or does not plead, or claims to be tried, he shall be required to state whether he wishes to cross-examine any, and, if so, which of the witnesses for the prosecution whose evidence has been taken. If he says he does so wish, the witnesses named by him shall be re-called, and, after cross-examination and re-examination (if any), they shall be discharged. The evidence of any remaining witnesses for the prosecution shall next be taken, and after cross-examination and re-examination (if any), they also shall be discharged. The accused shall then be called upon to enter upon his defence and produce his evidence.

(2) If the accused puts in any written statement, the Magistrate shall file it with the record.

257. (1) If the accused, after he has entered upon his defence, applies to the Magistrate to issue any process for compelling the attendance of any witness for the purpose of examination or cross-examination, or the production of any document or other thing, the Magistrate shall issue such process unless he considers that such application should be refused on the ground that it is made for the purpose of vexation or delay, or for defeating the ends of justice. Such grounds shall be recorded by him in writing:

Process for compelling production of evidence at instance of accused.

Provided that, when the accused has cross-examined or had the opportunity of cross-examining any witness after the charge is framed, the attendance of such witness shall not be compelled under this section, unless the Magistrate is satisfied that it is necessary for the purposes of justice.

(2) The Magistrate may, before summoning any witness on such application, require that his reasonable expenses incurred in attending for the purposes of the trial be deposited in Court.

258. (1) If in any case under this chapter in which a charge has been framed the Magistrate finds the accused not guilty, he shall record an order of acquittal.

(2) If in any such case the Magistrate finds the accused guilty, he shall pass sentence upon him according to law.

259. When the proceedings have been instituted upon complaint, and upon any day fixed for the hearing of the case the complainant is absent, and the offence may be lawfully compounded, the Magistrate may, in his discretion, notwithstanding anything hereinbefore contained, at any time before the charge has been framed, discharge the accused.

CHAPTER XXII.

OF SUMMARY TRIALS.

260. (1) Notwithstanding anything contained in this Code,—

(a) the District Magistrate,

(b) any Magistrate of the first class specially empowered in this behalf by the Local Government, and

- (c) any Bench of Magistrate invested with the powers of a Magistrate of the first class, and specially empowered in this behalf by the Local Government,

may, if he or they think fit, try in a summary way all or any of the following offences:—

- (a) offences not punishable with death, transportation or imprisonment for a term exceeding six months;
- (b) offences relating to weights and measures under Sections 264, 265 and 266 of the Indian Penal Code, XLV of 1860;
- (c) hurt, under Section 323 of the same Code;
- (d) theft, under Sections 379, 380 or 381 of the same Code, where the value of the property stolen does not exceed fifty rupees;
- (e) dishonest misappropriation of property under Section 403 of the same Code, where the value of the property misappropriated does not exceed fifty rupees;
- (f) receiving or retaining stolen property, under Section 411 of the same Code, where the value of such property does not exceed fifty rupees;
- (g) assisting in the concealment or disposal of stolen property, under Section 414 of the same Code, where the value of such property does not exceed fifty rupees;
- (h) mischief, under section 427 of the same Code;
- (i) house-trespass, under Section 448 and offences under Sections 451, 456 and 457 of the same Code;
- (j) insult with intent to provoke a breach of the peace, under Section 504, and criminal intimidation, under Section 506, of the same Code;
- (k) abetment of any of the foregoing offences;
- (l) an attempt to commit any of the foregoing offences, when such attempt is an offence;
- (m) offences under Section 20 of the Cattle-trespass Act, I of 1871:

Provided that no case in which a Magistrate exercises the special powers conferred by Section 34 shall be tried in a summary way.

(2) When in the course of a summary trial it appears to the Magistrate or Bench that the case is one which is of a character which renders it undesirable that it should be tried summarily, the Magistrate or Bench shall recall any witnesses who may have been examined and proceed to re-hear the case in manner provided by this Code.

261. The Local Government may confer on any Bench of Magistrates invested with the powers of a Magistrate of the second or third class power to try summarily all or any of the following offences:—

Power to invest Bench of Magistrates invested with less power.

- (a) offences against the Indian Penal Code, XLV of 1860, Sections 277, 278, 279, 285, 286, 289, 290, 292, 293, 294, 323, 334, 336, 341, 352 426 and 447;

- (b) offences against Municipal Acts, and the conservancy clauses of Police Acts which are punishable only with fine, or with imprisonment for a term not exceeding one month ;
- (c) abetment of any of the foregoing offences ;
- (d) an attempt to commit any of the foregoing offences, when such attempt is an offence.

262. (1) In trials under this chapter, the procedure prescribed for summons-cases shall be followed in summons-cases, and the procedure prescribed for warrant-cases shall be followed in warrant-cases, except as hereinafter mentioned.

Procedure for summons and warrant-cases applicable.

- (2) No sentence of imprisonment for a term exceeding three months shall be passed in the case of any conviction under this chapter.

Limit of imprisonment.

263. In cases where no appeal lies, the Magistrate or Bench of Magistrates need not record the evidence of the witnesses or frame a formal charge ; but he or they shall enter in such form as the Local Government may direct the following particulars :

Record in cases where there is no appeal.

- (a) the serial number ;
- (b) the date of the commission of the offence ;
- (c) the date of the report or complaint ;
- (d) the name of the complainant (if any) ;
- (e) the name, parentage and residence of the accused ;
- (f) the offence complained of and the offence (if any) proved, and in cases coming under clause (d), clause (e), clause (f) or clause (g) of sub-section (1) of Section 260 the value of the property in respect of which the offence has been committed ;
- (g) the plea of the accused and his examination (if any) ;
- (h) the finding, and, in the case of a conviction, a brief statement of the reasons therefor ;
- (i) the sentence or other final order ; and
- (j) the date on which the proceedings terminated.

264. (1) In every case tried summarily by a Magistrate or Bench in which an appeal lies, such Magistrate or Bench shall, before passing sentence, record a judgment embodying the substance of the evidence and also the particulars mentioned in Section 263.

Record in appealable cases.

- (2) Such judgment shall be the only record in cases coming within this section.

265. (1) Records made under Section 263 and judgments recorded under Section 264 shall be written by the presiding officer, either in English or in the language of the Court, or, if the Court to which such presiding officer is immediately subordinate so directs, in such officer's mother tongue.

Language of record and judgment.

(2) The Local Government may authorise any Bench of Magistrates empowered to try offences summarily to prepare the aforesaid record or judgment by means of an officer appointed in this behalf by the Court to which such Bench is immediately subordinate, and the record or judgment so prepared shall be signed by each member of such Bench present taking part in the proceedings.

(3) If no such authorisation be given, the record prepared by a member of the Bench and signed as aforesaid shall be the proper record.

(4) If the Bench differ in opinion, any dissentient member may write a separate judgment.

CHAPTER XXIII.

OF TRIALS BEFORE HIGH COURTS AND COURTS OF SESSION.

A.—Preliminary.

266. In this chapter, except in Sections 276 and 307, and in Chapter XVIII, the expression "High Court" means a High Court of Judicature established or to be established under the Indian High Courts Act, 1861, (24 & 25 Vict., c. 104,) and includes the Chief Court of the Punjab, the Court of the Recorder of Rangoon and such other Courts as the Governor General in Council may, by notification in the *Gazette of India*, declare to be High Courts for the purposes of this chapter.

Trials before High Court to be by jury.

267. All trials under this chapter before a High Court shall be by jury;

and notwithstanding anything herein contained, in all criminal cases transferred to a High Court under this Code or under the Letters Patent of any High Court established under the Indian High Courts Act, 1861, (24 & 25 Vict., c. 104,) the trial may, if the High Court so directs, be by jury.

Trials before Court of Session to be by jury or with assessors.

268. All trials before a Court of Session shall be either by jury, or with the aid of assessors.

269. (1) The Local Government may, with the previous sanction of the Governor General in Council, by order in the official *Gazette*, direct that the trial of all offences, or of any particular class of offences, before any Court of Session, shall be by jury in any district, and may, with the like sanction, revoke or alter such order.

(2) The Local Government, by like order, may also declare that, in the case of any district in which the trial of any offence is to be by jury, the trial of such offences shall, if the Judge, on application made to him or of his own motion, so directs, be by jurors summoned from a special jury list, and may revoke or alter such order.

(3) When the accused is charged at the same trial with several offences of which some are and some are not triable by jury, he shall be tried by jury for such of those offences as are triable by jury, and by the Court of Session, with the aid of the jurors as assessors, for such of them as are not triable by jury.

Trial before Court of Session to be conducted by Public Prosecutor.

270. In every trial before a Court of Session the prosecution shall be conducted by a Public Prosecutor.

B.—Commencement of Proceedings.

271. (1) When the Court is ready to commence the trial, the accused shall appear or be brought before it, and the charge shall be read out in Court and explained to him, and he shall be asked whether he is guilty of the offence charged, or claims to be tried.

Plea of guilty.

(2) If the accused pleads guilty, the plea shall be recorded, and he may be convicted thereon.

272. If the accused refuses to, or does not, plead, or if he claims to be tried, the Court shall proceed to choose jurors or assessors as hereinafter directed and to try the case :

Provided that, subject to the right of objection hereinafter mentioned, the same jury may try, or the same assessors may aid in the trial of, as many accused persons successively as the Court thinks fit.

273. (1) In trials before the High Court when it appears to the High Court, at any time before the commencement of the trial of the person charged, that any charge or any portion thereof is clearly unsustainable the Judge may make on the charge an entry to that effect.

(2) Such entry shall have the effect of staying proceedings upon the charge or portion of the charge, as the case may be.

C.—Choosing a Jury.

274. (1) In trials before the High Court the jury shall consist of nine persons.

(2) In trials by jury before the Court of Session the jury shall consist of such uneven number, not being less than three, or more than nine, as the Local Government, by order applicable to any particular district or to any particular class of offences in that district, may direct.

Jury for trial of persons not Europeans or Americans before Court of Session.

275. In a trial by jury before the Court of Session of a person not being an European or an American, a majority of the jury shall, if he so desires, consist of persons who are neither Europeans nor Americans.

276. The jurors shall be chosen by lot from the persons summoned to act as such, in such manner as the High Court may from time to time by rule direct :

Jurors to be chosen by lot.

Provided that—

Existing practice maintained ;

first, pending the issue under this section of rules for any Court, the practice now prevailing in such Court in respect to the choosing of jurors shall be followed ;

secondly, in case of a deficiency of persons summoned, the number of jurors required may, with the leave of the Court, be chosen from such other persons as may be present ;

trials before special jurors.

thirdly, in the presidency-towns—

(a) if the accused person is charged with having committed an offence punishable with death, or

(b) if in any other case a Judge of the High Court so directs,

the jurors shall be chosen from the special jury list hereinafter prescribed ; and

fourthly, in any district for which the Local Government has declared that the trial of certain offences may be by special jury, the jurors shall, in any case in which the Judge so directs, be chosen from the special jury list prescribed in section 325.

Names of jurors to be called. 277. (1) As each juror is chosen, his name shall be called aloud, and, upon his appearance, the accused shall be asked if he objects to be tried by such juror.

(2) Objection may then be taken to such juror by the accused or by the prosecutor, and the grounds of objection shall be stated :

Objection without grounds stated. Provided that, in the High Court, objections without grounds stated shall be allowed to the number of eight on behalf of the Crown and eight on behalf of the person or all the persons charged.

278. Any objection taken to a juror on any of the following grounds, if made out to the satisfaction of the Court, shall be allowed—

- (a) some presumed or actual partiality in the juror ;
- (b) some personal ground, such as alienage, deficiency in the qualification required by any law or rule having the force of law for the time being in force, or being under the age of twenty-one or above the age of sixty years ;
- (c) his having by habit or religious vows relinquished all care of worldly affairs ;
- (d) his holding any office in or under the Court ;
- (e) his executing any duties of police or being entrusted with police-duties ;
- (f) his having been convicted of any offence which, in the opinion of the Court, renders him unfit to serve on the jury ;
- (g) his inability to understand the language in which the evidence is given, or when such evidence is interpreted the language in which it is interpreted ;
- (h) any other circumstance which, in the opinion of the Court, renders him improper as a juror.

279. (1) Every objection taken to a juror shall be decided by the Court, and such decision shall be recorded and be final.

(2) If the objection is allowed, the place of such juror shall be supplied by any other juror attending in obedience to a summons and chosen in manner provided by section 276, or if there is no such other juror present, then by any other person present in the Court whose name is on the list of jurors, or whom the Court considers a proper person to serve on the jury :

Supply of place of juror against whom objection allowed. Provided that no objection to such juror or other person is taken under section 278 and allowed.

280. (1) When the jurors have been chosen, they shall appoint one of their number to be foreman.

(2) The foreman shall preside in the debates of the jury, deliver the verdict of the jury, and ask any information from the Court that is required by the jury or any of the jurors.

(3) If a majority of the jury do not, within such time as the Judge thinks reasonable, agree in the appointment of a foreman, he shall be appointed by the Court.

281. When the foreman has been appointed, the jurors shall be sworn under the Indian Oaths Act, X of 1873.

282. (1) If, in the course of a trial by jury, at any time before the return of the verdict, any juror, from any sufficient cause, is prevented from attending throughout the trial, or if any juror absents himself, and it is not practicable to enforce his attendance, or if it appears that any juror is unable to understand the language in which the evidence is given, or, when such evidence is interpreted, the language in which it is interpreted, a new juror shall be added, or the jury shall be discharged and a new jury chosen.

(2) In each of such cases the trial shall commence anew.

283. The Judge may also discharge the jury whenever the prisoner becomes incapable of remaining at the bar.

D.—Choosing Assessors.

284. When the trial is to be held with the aid of assessors, two or more shall be chosen, as the Judge thinks fit, from the persons summoned to act as such.

285. (1) If, in the course of a trial with the aid of assessors, at any time before the finding, any assessor is, from any sufficient cause, prevented from attending throughout the trial, or absent himself, and it is not practicable to enforce his attendance, the trial shall proceed with the aid of the other assessor or assessors.

(2) If all the assessors are prevented from attending, or absent themselves, the proceedings shall be stayed, and a new trial shall be held with the aid of fresh assessors.

E.—Trial to Close of Cases for Prosecution and Defence.

286. (1) When the jurors or assessors have been chosen, the prosecutor shall open his case by reading from the Indian Penal Code, XLV of 1860, or other law the description of the offence charged, and stating shortly by what evidence he expects to prove the guilt of the accused.

(2) The prosecutor shall then examine his witnesses.

287. The examination of the accused duly recorded by or before the committing Magistrate shall be tendered by the prosecutor and read as evidence.

288. The evidence of a witness duly taken in the presence of the accused before the committing Magistrate may, in the discretion of the presiding Judge, if such witness is produced and examined, be treated as evidence in the case.

Evidence given at preliminary inquiry admissible.

289. (1) When the examination of the witnesses for the prosecution and the examination (if any) of the accused are concluded, the accused shall be asked whether he means to adduce evidence.

Procedure after examination of witnesses for prosecution.

(2) If he says that he does not, the prosecutor may sum up his case; and, if the Court considers that there is no evidence that the accused committed the offence, it may then, in a case tried with the aid of assessors, record a finding, or, in a case tried by a jury, direct the jury to return a verdict, of not guilty.

(3) If the accused, or any one of several accused, says that he means to adduce evidence, and the Court considers that there is no evidence that the accused committed the offence, the Court may then, in a case tried with the aid of assessors, record a finding, or, in a case tried by a jury, direct the jury to return a verdict, of not guilty.

(4) If the accused, or any one of several accused, says that he means to adduce evidence, and the Court considers that there is evidence that he committed the offence, or if, on his saying that he does not mean to adduce evidence, the prosecutor sums up his case and the Court considers that there is evidence that the accused committed the offence, the Court shall call on the accused to enter on his defence.

290. The accused or his pleader may then open his case, stating the facts or law on which he intends to rely, and making such comments as he thinks necessary on the evidence for the prosecution. He may then examine his witnesses (if any) and after their cross-examination and re-examination (if any) may sum up his case.

Defence.

291. The accused shall be allowed to examine any witness not previously named by him, if such witness is in attendance; but he shall not, except as provided in sections 211 and 231, be entitled of right to have any witness summoned, other than the witnesses named in the list delivered to the Magistrate by whom he was committed for trial.

Right of accused as to examination and summoning of witnesses.

Prosecutor's right of reply.

292. If the accused or any of the accused, adduces any evidence, the prosecutor shall be entitled to reply.

293. (1) Whenever the Court thinks that the jury or assessors should view the place in which the offence charged is alleged to have been committed, or any other place in which any other transaction material to the trial is alleged to have occurred, the Court shall make an order to that effect, and the jury or assessors shall be conducted in a body, under the care of an officer of the Court, to such place, which shall be shown to them by a person appointed by the Court.

View by jury or assessors.

(2) Such officer shall not, except with the permission of the Court, suffer any other person to speak to, or hold any communication with, any of the jury or assessors, and, unless the Court otherwise directs, they shall, when the view is finished, be immediately conducted back into Court.

294. If a juror or assessor is personally acquainted with any relevant fact it is his duty to inform the Judge that such is the case, whereupon he may be sworn, examined, cross-examined and re-examined in the same manner as any other witness.

When juror or assessor may be examined.

295. If a trial is adjourned, the jury or assessors shall attend at the adjourned sitting, and at every subsequent sitting until the conclusion of the trial.

Jury or assessors to attend at adjourned sitting.

296. The High Court may, from time to time, make rules as to keeping the jury together during a trial before such Court lasting for more than one day; and, subject to such rules, the presiding Judge may order whether and in what manner the jurors shall be kept together under the charge of an officer of the Court, or whether they shall be allowed to return to their respective homes.

Locking up jury.

F.—Conclusion of Trial in Cases tried by Jury.

297. In cases tried by jury, when the case for the defence and the prosecutor's reply (if any) are concluded, the Court shall proceed to charge the jury, summing up the evidence for the prosecution and defence, and laying down the law by which the jury are to be guided.

Charge to jury.

298. (1) In such cases it is the duty of the Judge—

Duty of Judge.

(a) to decide all questions of law arising in the course of the trial, and especially all questions as to the relevancy of facts which it is proposed to prove, and the admissibility of evidence or the propriety of questions asked by or on behalf of the parties; and, in his discretion, to prevent the production of inadmissible evidence whether it is or is not objected to by the parties;

(b) to decide upon the meaning and construction of all documents given in evidence at the trial;

(c) to decide upon all matters of fact which it may be necessary to prove in order to enable evidence of particular matters to be given.

(d) to decide whether any question which arises is for himself or for the jury, and upon this point his decision shall bind the jurors.

(2) The Judge may, if he thinks proper, in the course of his summing up express to the jury his opinion upon any question of fact, or upon any question of mixed law and fact, relevant to the proceeding.

Illustrations.

(a) It is proposed to prove a statement made by a person not being a witness in the case on the ground that circumstances are proved which render evidence of such statement admissible.

It is for the Judge, and not for the jury, to decide whether the existence of those circumstances has been proved.

(b) It is proposed to give secondary evidence of a document, the original of which is alleged to have been lost or destroyed.

It is the duty of the Judge to decide whether the original has been lost or destroyed.

Duty of jury.**299. It is the duty of the jury—**

- (a) to decide which view of the facts is true and then to return the verdict which under such view ought, according to the direction of the Judge, to be returned ;
- (b) to determine the meaning of all technical terms (other than terms of law) and words used in an unusual sense which it may be necessary to determine, whether such words occur in documents or not ;
- (c) to decide all questions which, according to law, are to be deemed questions of fact ;
- (d) to decide whether general indefinite expressions do or do not apply to particular cases, unless such expressions refer to legal procedure, or unless their meaning is ascertained by law, in either of which cases it is the duty of the Judge to decide their meaning.

Illustrations.

- (a) A is tried for the murder of B.

It is the duty of the Judge to explain to the jury the distinction between murder and culpable homicide, and to tell them under what views of the facts A ought to be convicted of murder or of culpable homicide, or to be acquitted.

It is the duty of the jury to decide which view of the facts is true, and to return a verdict in accordance with the direction of the Judge, whether that direction is right or wrong, and whether they do or do not agree with it.

- (b) The question is whether a person entertained a reasonable belief on a particular point—whether work was done with reasonable skill or due diligence.

Each of these is a question for the jury.

Retirement to consider.

300. In cases tried by jury, after the Judge has finished his charge, the jury may retire to consider their verdict.

Except with the leave of the Court, no person other than a juror shall speak to, or hold any communication with, any member of such jury.

301. When the jury have considered their verdict the foreman shall inform the Judge, what is their verdict, or what is the verdict of a majority.

Delivery of verdict.

302. If the jury are not unanimous, the Judge may require them to retire for further consideration. After such a period as the Judge considers reasonable, the jury may deliver their verdict, although they are not unanimous.

Procedure where jury differ.

303. (1) Unless otherwise ordered by the Court, the jury shall return a verdict on all the charges on which the accused is tried, and the Judge may ask them such questions as are necessary to ascertain what their verdict is.

Verdict to be given on each charge. Judge may question jury.**Questions and answers to be recorded.**

(2) Such questions and the answers to them shall be recorded.

304. When by accident or mistake a wrong verdict is delivered, the jury may, before or immediately after it is recorded, amend the verdict, and it shall stand as ultimately amended.

Amending verdict.

305. (1) When in a case tried before a High Court the jury are unanimous in their opinion, or when as many as six are of one opinion and the Judge agrees with them, the Judge shall give judgment in accordance with such opinion.

Verdict in High Court when to prevail.

(2) When in any such case the jury are satisfied that they will not be unanimous, but six of them are of one opinion, the foreman shall so inform the Judge.

Discharge of jury in other cases. (3) If the Judge disagrees with the majority, he shall at once discharge the jury.

(4) If there are not so many as six who agree in opinion, the Judge shall, after the lapse of such time as he thinks reasonable, discharge the jury.

306. (1) When in a case tried before the Court of Session the Judge does not think it necessary to express disagreement with the verdict of the jurors or of a majority of the jurors he shall give judgment accordingly.

Verdict in Court of Session when to prevail. (2) If the accused is acquitted, the Judge shall record judgment of acquittal. If the accused is convicted, the Judge shall pass sentence on him according to law.

307. (1) If in any such case the Judge disagrees with the verdict of the jurors, or of a majority of the jurors, on all or any of the charges on which the accused has been tried, and is clearly of opinion that it is necessary for the ends of justice to submit the case to the High Court, he shall submit the case accordingly, recording the grounds of his opinion, and, when the verdict is one of acquittal, stating the offence which he considers to have been committed.

Procedure where Sessions Judge disagrees with verdict. (2) Whenever the Judge submits a case under this section, he shall not record judgment of acquittal or of conviction on any of the charges on which the accused has been tried, but he may either remand the accused to custody or admit him to bail.

(3) In dealing with the case so submitted the High Court may exercise any of the powers which it may exercise on an appeal, and subject thereto it shall, after considering the entire evidence and after giving due weight to the opinions of the Sessions Judge and the jury, acquit or convict the accused of any offence of which the jury could have convicted him upon the charge framed and placed before it; and, if it convicts him, may pass such sentence as might have been passed by the Court of Session.

G.—Re-trial of Accused after Discharge of Jury.

308. Whenever the jury is discharged, the accused shall be detained in custody or on bail (as the case may be), and shall be tried by another jury, unless the Judge considers that he should not be re-tried, in which case the Judge shall make an entry to that effect on the charge, and such entry shall operate as an acquittal.

H.—Conclusion of Trial in Cases tried with Assessors.

309. (1) When, in a case tried with the aid of assessors, the case for the defence and the prosecutor's reply (if any) are concluded, the Court may sum up the evidence for the prosecution and defence, and shall then require each of the assessors to state his opinion orally, and shall record such opinion.

Delivery of opinions of assessors. (2) The Judge shall then give judgment, but in doing so shall not be bound to conform to the opinions of the assessors.

(3) If the accused is convicted, the Judge shall pass sentence on him according to law.

I.—Procedure in Case of Previous Conviction.

310. In the case of a trial by jury or with the aid of assessors, where the accused is charged with an offence committed after a previous conviction for any offence, the procedure laid down in sections 271, 286, 305, 306 and 309 shall be modified as follows :—

- (a) the part of the charge stating the previous conviction shall not be read out in Court, nor shall the accused be asked whether he has been previously convicted as alleged in the charge unless and until he has either pleaded guilty to, or been convicted of, the subsequent offence :
- (b) if he pleads guilty to, or is convicted of, the subsequent offence, he shall then be asked whether he has been previously convicted as alleged in the charge :
- (c) if he answers that he has been so previously convicted, the Judge may proceed to pass sentence on him accordingly ; but, if he denies that he has been so previously convicted, or refuses to, or does not, answer such question, the jury, or the Court and the assessors (as the case may be), shall then hear evidence concerning such previous conviction, and in such case (where the trial is by jury) it shall not be necessary to swear the jurors again.

311. Notwithstanding anything in the last foregoing section, evidence of the previous conviction may be given at the trial for the subsequent offence, if the fact of the previous conviction is relevant under the provisions of the Indian Evidence Act, I of 1872.

J.—List of Jurors for High Court, and summoning Jurors for that Court.

312. The names of not more than four hundred persons shall at any one time be entered in the special jurors' list.

313. (1) The Clerk of the Crown shall, before the first day of April in each year, and subject to such rules as the High Court from time to time prescribes, prepare —

- (a) a list of all persons liable to serve as common jurors ; and
- (b) a list of persons liable to serve as special jurors only.

(2) Regard shall be had, in the preparation of the latter list, to the property, character and education of the persons whose names are entered therein.

(3) No person shall be entitled to have his name entered in the special jurors' list merely because he may have been entered in the special jurors' list for a previous year.

(4) The Governor-General in Council in the case of the High Court at Fort William in Bengal, and, in the case of other High Courts, the Local Government, may exempt any salaried officer of Government from serving as a juror.

(5) The Clerk of the Crown shall, subject to such rules as aforesaid, have full discretion to prepare the said lists as seems to him to be proper, and there shall be no appeal from, or review of, his decision.

Discretion of officer preparing lists.

314. (1) Preliminary lists of persons liable to serve as common jurors and as special jurors, respectively, signed by the Clerk of the Crown, shall be published once in the local official Gazette before the fifteenth day of April next after their preparation.

Publication of lists, preliminary and revised.

(2) Revised lists of persons liable to serve as common jurors and special jurors, respectively, signed as aforesaid, shall be published once in the local official Gazette before the first day of May next after their preparation.

(3) Copies of the said lists shall be affixed to some conspicuous part of the court-house.

315. (1) Out of the persons named in the revised lists aforesaid, there shall be summoned for each sessions in each presidency-town at least twenty-seven of those who are liable to serve on special juries, and fifty-four of those who are liable to serve on common juries.

Number of jurors to be summoned in presidency-towns.

(2) No person shall be so summoned more than once in six months unless the number cannot be made up without him.

(3) If during the continuance of any sessions it appears that the number of persons so summoned is not sufficient, such number as may be necessary of other persons liable to serve as aforesaid shall be summoned for such sessions.

Supplementary summons.

316. Whenever a High Court has given notice of its intention to hold sittings at any place outside the presidency-towns for the exercise of its original criminal jurisdiction, the Court of Session at such place shall, subject to any direction which may be given by the High Court, summon a sufficient number of jurors from its own list, in the manner hereinafter prescribed for summoning jurors to the Court of Session.

Summoning jurors outside the presidency-towns.

317. (1) In addition to the persons so summoned as jurors, the said Court of Session shall, if it thinks needful, after communication with the commanding officer, cause to be summoned such number of commissioned and non-commissioned officers in Her Majesty's Army resident within ten miles of its place of sitting as the Court considers to be necessary to make up the juries required for the trial of persons charged with offences before the High Court as aforesaid.

Military jurors.

(2) All officers so summoned shall be liable to serve on such juries notwithstanding anything contained in this Code; but no such officer shall be summoned whom his commanding officer desires to have excused on the ground of urgent military duty, or for any other special military reason.

318. Any person summoned under section 315, section 316 or section 317, who, without lawful excuse, fails to attend as required by the summons, or who, having attended, departs without having obtained the permission of the Judge, or fails to attend after an adjournment of the Court after being ordered to attend, shall be deemed guilty of a contempt and be liable, by order of the

Failure of jurors to attend.

Judge, to such fine as he thinks fit; and, in default of payment of such fine, to imprisonment for a term not exceeding six months in the civil jail until the fine is paid :

Provided that the Court may in its discretion remit any fine or imprisonment so imposed.

K.—List of Jurors and Assessors for Court of Session and summoning Jurors and Assessors for that Court.

319. All male persons between the ages of twenty-one and sixty shall, except as next hereinafter mentioned, be liable to serve as jurors or assessors at any trial held within the district in which they reside,

or, if the Local Government, on consideration of local circumstances, has fixed any smaller area in this behalf, within the area so fixed.

320. The following persons are exempt from liability to serve as jurors or assessors, namely :—

- (a) officers in civil employ superior in rank to a District Magistrate ;
- (b) salaried Judges ;
- (c) Commissioners and Collectors of Revenue or Customs ;
- (d) police-officers and persons engaged in the Preventive Service in the Customs Department ;
- (e) persons engaged in the collection of the revenue whom the Collector thinks fit to exempt on the ground of official duty ;
- (f) persons actually officiating as priests or ministers of their respective religions ;
- (g) persons in Her Majesty's Army, except when, by any law in force for the time being, they are specially made liable to serve as jurors or assessors ;
- (h) surgeons and others who openly and constantly practise the medical profession ;
- (i) legal practitioners (as defined by the Legal Practitioners Act, XVIII of 1879) in actual practice ;
- (j) persons employed in the Post-office and Telegraph Departments ;
- (k) persons exempted from personal appearance in Court under the provisions of the Code of Civil Procedure, XIV of 1882, sections 640 and 641 ;
- (l) other persons exempted by the Local Government from liability to serve as jurors or assessors.

321. (1) The Sessions Judge, and the Collector of the district or such other officer as the Local Government appoints in this behalf, shall prepare and make out in alphabetical order a list of persons liable to serve as jurors or assessors and qualified in the judgment of the Sessions Judge and Collector or other officer as aforesaid to serve as such, and not likely to be successfully objected to under section 278, clauses (b) to (h), both inclusive.

List of jurors and assessors.

(2) The list shall contain the name, place of abode and quality or business of every such person; and, if the person is an European or an American, the list shall mention the race to which he belongs.

322. Copies of such list shall be stuck up in the office of the Collector or other officer as aforesaid, and in the court-houses of the District Magistrate and of the District Court, and extracts therefrom in some conspicuous place in the town or towns in or near which the persons named in the extract reside.

323. To every such copy or extract shall be subjoined a notice stating that objections to the list will be heard and determined by the Sessions Judge and Collector or other officer as aforesaid, at the sessions court-house, and at a time to be mentioned in the notice.

324. (1) For the hearing of such objections the Sessions Judge shall sit with the Collector or other officer as aforesaid, and shall, at the time and place mentioned in the notice, revise the list and hear the objections (if any) of persons interested in the amendment thereof, and shall strike out the name of any person not suitable in their judgment to serve as a juror or as an assessor, or who may establish his right to any exemption from service given by section 320, and insert the name of any person omitted from the list whom they deem qualified for such service.

(2) In the event of a difference of opinion between the Sessions Judge and the Collector or other officer as aforesaid, the name of the proposed juror or assessor shall be omitted from the list.

(3) A copy of the revised list shall be signed by the Sessions Judge and Collector or other officer as aforesaid, and sent to the Court of Session.

(4) Any order of the Sessions Judge and Collector or other officer as aforesaid in preparing and revising the list shall be final.

(5) Any exemption not claimed under this section shall be deemed to be waived until the list is next revised.

(6) The list so prepared and revised shall be again revised once in every year.

(7) The list so revised shall be deemed a new list, and shall be subject to all the rules hereinbefore contained as to the list originally prepared.

325. In the case of any district for which the Local Government has declared that the trial of certain offences shall, if the Judge so direct, be by special jury, the Sessions Judge and the Collector of such district or other officer as aforesaid shall prepare, in addition to the revised list hereinbefore prescribed, a special list containing the names of such jurors as are borne on the revised list and are, in the opinion of such Sessions Judge and Collector or other officer as aforesaid, by reason of their possessing superior qualifications in respect of property, character or education, fit persons to serve as special jurors: Provided always that the inclusion of the name of any person in such special list shall not involve the removal of his name from the revised list, nor relieve him of his liability to serve as an ordinary juror in cases not tried by special jury.

326. (1) The Sessions Judge shall ordinarily, seven days at least before the day which he may from time to time fix for holding the sessions, send a letter to the District Magistrate requesting him to summon as many persons named in the said revised list or the said special list as seem to the Sessions Judge to be needed for trials by jury and trials with the aid of assessors at the said sessions, the number to be summoned not being less than double the number required for any such trial.

(2) The names of the persons to be summoned shall be drawn by lot in open Court, excluding those who have served within six months unless the number cannot be made up without them; and the names so drawn shall be specified in the said letter.

327. The Court of Session may direct jurors or assessors to be summoned at other periods than the period specified in section 326, when the number of trials before the Court renders the attendance of one set of jurors or assessors for a whole session oppressive, or whenever for other reasons such direction is found to be necessary.

328. Every summons to a juror or assessor shall be in writing, and shall require his attendance as a juror or assessor, as the case may be, at a time and place to be therein specified.

329. When any person summoned to serve as a juror or assessor is in the service of Government or of a Railway Company, the Court to serve in which he is so summoned may excuse his attendance if it appears on the representation of the head of the office in which he is employed that he cannot serve as a juror or assessor, as the case may be, without inconvenience to the public.

330. (1) The Court of Session may, for reasonable cause, excuse any juror or assessor from attendance at any particular session.

(2) The Court of Session may, if it shall think fit, at the conclusion of any trial by special jury, direct that the jurors who have served on such jury shall not be summoned to serve again as jurors for a period of twelve months.

331. (1) At each session the said Court shall cause to be made a list of the names of those who have attended as jurors and assessors at such session.

(2) Such list shall be kept with the list of the jurors and assessors as revised under section 324.

(3) A reference shall be made in the margin of the said revised list to each of the names which are mentioned in the list prepared under this section.

332. (1) Any person summoned to attend as a juror or as an assessor who, without lawful excuse, fails to attend as required by the summons, or who, having attended, departs without having obtained the permission of the Court, or fails to attend after an adjournment of the Court after being ordered to attend,

shall be liable by order of the Court of Session to a fine not exceeding one hundred rupees.

(2) Such fine shall be levied by the District Magistrate by attachment and sale of any moveable property belonging to such juror or assessor within the local limits of the jurisdiction of the Court making the order.

(3) For good cause shown, the Court may remit or reduce any fine so imposed.

(4) In default of recovery of the fine by attachment and sale, such juror or assessor may, by order of the Court of Session, be imprisoned in the civil jail for the term of fifteen days, unless such fine is paid before the end of the said term.

L.—Special Provisions for High Courts.

333. At any stage of any trial before a High Court under this Code before the return of the verdict, the Advocate General may, if he thinks fit, inform the Court on behalf of Her Majesty that he will not further prosecute the defendant upon the charge; and thereupon all proceedings on such charge against the defendant shall be stayed, and he shall be discharged of and from the same. But such discharge shall not amount to an acquittal unless the presiding Judge otherwise directs.

334. For the exercise of its original criminal jurisdiction, every High Court shall hold sittings on such days and at such convenient intervals as the Chief Justice of such Court from time to time appoints.

335. (1) The High Court shall hold its sittings at the place at which it now holds them, or at such other place (if any) as the Governor-General in Council in the case of the High Court at Fort William, or the Local Government in the case of the other High Courts, may direct.

(2) But it may, from time to time, in the case of the High Court at Fort William with the consent of the Governor-General in Council, and in all other cases with the consent of the Local Government, hold sittings at such other places within the local limits of its appellate jurisdiction as the High Court appoints.

(3) Such officer as the Chief Justice directs shall give notice beforehand in the local official Gazette of all sittings intended to be held for the exercise of the original criminal jurisdiction of the High Court.

336. The High Court may direct that all European British subjects and persons liable to be tried by it under section 214, who have been committed for trial by it within certain specified districts or during certain specified periods of the year, shall be tried at the ordinary place of sitting of the Court, or direct that they shall be tried at a particular place named.

CHAPTER XXIV.

GENERAL PROVISIONS AS TO INQUIRIES AND TRIALS.

337. (1) In the case of any offence triable exclusively by the Court of Session or High Court, the District Magistrate, a Presidency Magistrate, any Magistrate of the first class inquiring into the offence, or, with the sanction of the

District Magistrate, any other Magistrate, may, with the view of obtaining the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, the offence under inquiry, tender a pardon to such person on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to such offence, and to every other person concerned, whether as principal or abettor, in the commission thereof.

(2) Every person accepting a tender under this section shall be examined as a witness in the case.

(3) Such person, if not on bail, shall be detained in custody until the termination of the trial by the Court of Session or High Court, as the case may be.

(4) Every Magistrate, other than a Presidency Magistrate, who tenders a pardon under this section shall record his reasons for so doing; and, when any Magistrate has made such tender and examined the person to whom it has been made he shall not try the case himself, although the offence which the accused appears to have committed may be triable by such Magistrate.

338. At any time after commitment, but before judgment is passed, the Court to which the commitment is made may, with the view of obtaining on the trial the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, any such offence, tender or order the committing Magistrate or the District Magistrate to tender, a pardon on the same condition to such person.

339. (1) Where a pardon has been tendered under section 337 or section 338, and any person who has accepted such tender has, either by wilfully concealing anything essential or by giving false evidence, not complied with the condition on which the tender was made, he may be tried for the offence in respect of which the pardon was so tendered, or for any other offence of which he appears to have been guilty in connection with the same matter.

(2) The statement made by a person who has accepted a tender of pardon may be given in evidence against him when the pardon has been forfeited under this section.

(3) No prosecution for the offence of giving false evidence in respect of such statement shall be entertained without the sanction of the High Court.

340. Every person accused before any Criminal Court may of right be defended by a pleader.

341. If the accused, though not insane, cannot be made to understand the proceedings the Court may proceed with the inquiry or trial; and, in the case of a Court other than a High Court, if such inquiry results in a commitment, or if such trial results in a conviction, the proceedings shall be forwarded to the High Court with a report of the circumstances of the case, and the High Court shall pass thereon such order as it thinks fit.

342. (1) For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the Court may, at any stage of any inquiry or trial, without previously warning the accused, put such questions to him as the Court considers necessary, and shall, for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined, and before he is called on for his defence.

(2) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them; but the Court and the jury (if any) may draw such inference from such refusal or answers as it thinks just.

(3) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.

(4) No oath shall be administered to the accused.

343. Except as provided in sections 337 and 338, no influence, by means of any promise or threat or otherwise, shall be used to an accused person to induce him to disclose or withhold any matter within his knowledge.

No influence to be used to induce disclosures.

344. (1) If, from the absence of a witness, or any other reasonable cause, it becomes necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, the Court may, if it thinks fit, by order in writing, stating the reasons therefor, from time to time, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody:

Power to postpone or adjourn proceedings.

Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time.

Remand.

(2) Every order made under this section by a Court other than a High Court shall be in writing signed by the presiding Judge or Magistrate.

Explanation.—If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence, and it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for a remand.

Reasonable cause for remand.

345. (1) The offences punishable under the sections of the Indian Penal Code, XLV of 1860, described in the first two columns of the table next following may be compounded by the persons mentioned in the third column of that table:—

Offence.	Sections of Indian Penal Code applicable.	Persons by whom offence may be compounded.
Uttering words, etc., with deliberate intent to wound the religious feelings of any person.	298	The person whose religious feelings are intended to be wounded.
Causing hurt	323, 334	The person to whom the hurt is caused.
Wrongfully restraining or confining any person.	341, 342	The person restrained or confined.
Assault or use of criminal force	352, 355, 358	The person assaulted or to whom criminal force is used.
Unlawful compulsory labour	374	The person compelled to labour.

Offence.	Sections of Indian Penal Code applicable.	Person by whom offence may be compounded.
Mischief, when the only loss or damage caused is loss or damage to a private person.	426, 427	The person to whom the loss or damage is caused.
Criminal trespass	447	The person in possession of the property trespassed upon.
House-trespass	448	
Criminal breach of contract of service ...	490, 491, 492	The person with whom the offender has contracted.
Adultery	497	The husband of the woman.
Enticing or taking away or detaining with a criminal intent a married woman.	498	
Defamation	500	The person defamed.
Printing or engraving matter knowing it to be defamatory.	501	
Sale of printed or engraved substance containing defamatory matter, knowing it to contain such matter.	502	
Insult intended to provoke a breach of the peace.	504	The person insulted.
Criminal intimidation, except when the offence is punishable with imprisonment for seven years.	506	The person intimidated.

(2) The offences of causing hurt and grievous hurt, punishable under section 324, section 325, section 335, section 337, or section 338 of the Indian Penal Code, XLV of 1860, may, with the permission of the Court before which any prosecution for such offence is pending, be compounded by the person to whom the hurt has been caused.

(3) When any offence is compoundable under this section, the abetment of such offence or an attempt to commit such offence (when such attempt is itself an offence) may be compounded in like manner.

(4) When the person who would otherwise be competent to compound an offence under this section is a minor, an idiot or a lunatic, any person competent to contract on his behalf may compound such offence.

(5) When the accused has been committed for trial or when he has been convicted and an appeal is pending, no composition for the offence shall be allowed without the leave of the Court to which he is committed, or, as the case may be, before which the appeal is to be heard.

(6) The composition of an offence under this section shall have the effect of an acquittal of the accused.

(7) No offence shall be compounded except as provided by this section.

346. (1) If, in the course of an inquiry or a trial before a Magistrate in any district outside the presidency-towns, the evidence appears to him to warrant a presumption that the case is one which should be tried or committed for trial by

Procedure of Provincial Magistrate in cases which he cannot dispose of.

some other Magistrate in such district, he shall stay proceedings and submit the case, with a brief report explaining its nature, to any Magistrate to whom he is subordinate, or to such other Magistrate, having jurisdiction, as the District Magistrate directs.

(2) The Magistrate to whom the case is submitted may, if so empowered, either try the case himself, or refer it to any Magistrate subordinate to him having jurisdiction, or commit the accused for trial.

347. (1) If in any inquiry before a Magistrate, or in any trial before a Magistrate before signing judgment, it appears to him at any stage of the proceedings that the case is one which ought to be tried by the Court of Session or High Court, and if he is empowered to commit for trial, he shall stop further proceedings and commit the accused under the provisions hereinbefore contained.

(2) If such Magistrate is not empowered to commit for trial, he shall proceed under Section 346.

348. Whoever, having been convicted of an offence punishable under Chapter XII or Chapter XVII of the Indian Penal Code, XLV of 1860, with imprisonment for a term of three years or upwards, is again accused of any offence punishable under either of those Chapters with imprisonment for a term of three years or upwards, shall be committed to the Court of Session or High Court, as the case may be, unless the Magistrate before whom the proceedings are pending is of opinion that he can himself pass an adequate sentence if the accused is convicted :

Provided that, if the District Magistrate has been invested with powers under Section 30, the case may be transferred to him instead of being committed to the Court of Session.

349. (1) Whenever a Magistrate of the second or third class, having jurisdiction, is of opinion, after hearing the evidence for the prosecution and the accused, that the accused is guilty, and that he ought to receive a punishment different in kind from, or more severe than, that which such Magistrate is empowered to inflict, or that he ought to be required to execute a bond under Section 106, he may record the opinion and submit his proceedings, and forward the accused, to the District Magistrate or Subdivisional Magistrate to whom he is subordinate.

(2) The Magistrate to whom the proceedings are submitted may, if he thinks fit, examine the parties and recall and examine any witness who has already given evidence in the case, and may call for and take any further evidence, and shall pass such judgment, sentence or order in the case as he thinks fit, and as is according to law :

Provided that he shall not inflict a punishment more severe than he is empowered to inflict under sections 32 and 33.

350. (1) Whenever any Magistrate, after having heard and recorded the whole or any part of the evidence in an inquiry or a trial, ceases to exercise jurisdiction therein, and is succeeded by another Magistrate who has and who exercises such jurisdiction, the Magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself ; or he may re-summon the witnesses and re-commence the inquiry or trial :

Provided as follows :—

- (a) in any trial the accused may, when the second Magistrate commences his proceedings, demand that the witnesses or any of them be re-summoned and re-heard ;
- (b) the High Court or, in cases tried by Magistrates subordinate to the District Magistrate, the District Magistrate may, whether there be an appeal or not, set aside any conviction passed on evidence not wholly recorded by the Magistrate before whom the conviction was held, if such Court or District Magistrate is of opinion that the accused has been materially prejudiced thereby, and may order a new inquiry or trial.
- (2) Nothing in this section applies to cases in which proceedings have been stayed under Section 346.
351. (1) Any person attending a Criminal Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of inquiry into or trial of any offence of which such Court can take cognizance and which, from the evidence, may appear to have been committed, and may be proceeded against as though he had been arrested or summoned.
- (2) When the detention takes place in the course of an inquiry under Chapter XVIII, or after a trial has been begun, the proceedings in respect of such person shall be commenced afresh, and the witnesses re-heard.
352. The place in which any Criminal Court is held for the purpose of inquiring into or trying any offence shall be deemed an open Court, to which the public generally may have access, so far as the same can conveniently contain them :
- Provided that the presiding Judge or Magistrate may, if he thinks fit, order at any stage of any inquiry into, or trial of, any particular case that the public generally, or any particular person, shall not have access to, or be or remain in, the room or building used by the Court.

CHAPTER XXV.

OF THE MODE OF TAKING AND RECORDING EVIDENCE IN INQUIRIES AND TRIALS.

353. Except as otherwise expressly provided, all evidence taken under Chapters XVIII, XX, XXI, XXII and XXIII shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in presence of his pleader.
354. In inquiries and trials (other than summary trials) under this Code by or before a Magistrate (other than a Presidency Magistrate) or Sessions Judge, the evidence of the witnesses shall be recorded in the following manner.
355. (1) In summons-cases tried before a Magistrate other than a Presidency Magistrate, and in cases of the offences mentioned in sub-section (1) of section 260, clauses (b) to (m), both inclusive, when tried by a Magistrate of the first or second class, and in all proceedings under section 514 (if not in the course of a trial), the Magistrate shall make a memorandum of the substance of the evidence of each witness as the examination of the witness proceeds.

(2) Such memorandum shall be written and signed by the Magistrate with his own hand, and shall form part of the record.

(3) If the Magistrate is prevented from making a memorandum as above required, he shall record the reason of his inability to do so, and shall cause such memorandum to be made in writing from his dictation in open Court, and shall sign the same; and such memorandum shall form part of the record.

356. (1) In all other trials before Courts of Session and Magistrates (other than Presidency Magistrates) and in all inquiries under Chapters XII and XVIII, the evidence of each witness shall be taken down in writing in the language of the Court, by the Magistrate or Sessions Judge, or in his presence and hearing and under his personal direction and superintendence, and shall be signed by the Magistrate or Sessions Judge.

(2) When the evidence of such witness is given in English, the Magistrate or Sessions Judge may take it down in that language with his own hand, and, unless the accused is familiar with English, or the language of the Court is English, an authenticated translation of such evidence in the language of the Court shall form part of the record.

(3) In cases in which the evidence is not taken down in writing by the Magistrate or Sessions Judge, he shall, as the examination of each witness proceeds, make a memorandum of the substance of what such witness deposes; and such memorandum shall be written and signed by the Magistrate or Sessions Judge with his own hand, and shall form part of the record.

(4) If the Magistrate or Sessions Judge is prevented from making a memorandum as above required he shall record the reason of his inability to make it.

357. (1) The Local Government may direct that in any district or part of a district, or in proceedings before any Court of Session, or before any Magistrate or class of Magistrates, the evidence of each witness shall, in the cases referred to in Section 356, be taken down by the Sessions Judge or Magistrate with his own hand and in his mother tongue, unless he is prevented by any sufficient reason from taking down the evidence of any witness, in which case he shall record the reason of his inability to do so, and shall cause the evidence to be taken down in writing from his dictation in open Court.

(2) The evidence so taken down shall be signed by the Sessions Judge or Magistrate, and shall form part of the record:

Provided that the Local Government may direct the Sessions Judge or Magistrate to take down the evidence in the English language, or in the language of the Court, although such language is not his mother-tongue.

358. In cases of the kind mentioned in Section 355, the Magistrate may, if he thinks fit, take down the evidence of any witness in the manner provided in Section 356, or, if within the local limits of the jurisdiction of such Magistrate the Local Government has made the order referred to in Section 357, in the manner provided in the same section.

359. (1) Evidence taken under Section 356 or Section 357 shall not ordinarily be taken down in the form of question and answer, but in the form of a narrative.

(2) The Magistrate or Sessions Judge may, in his discretion, take down, or cause to be taken down, any particular question and answer.

360. (1) As the evidence of each witness taken under Section 356 or Section 357 is completed, it shall be read over to him in the presence of the accused, if in attendance, or of his pleader, if he appears by pleader, and shall, if necessary, be corrected.

Procedure in regard to such evidence when completed.

(2) If the witness denies the correctness of any part of the evidence when the same is read over to him, the Magistrate or Sessions Judge may, instead of correcting the evidence, make a memorandum thereon of the objection made to it by the witness, and shall add such remarks as he thinks necessary.

(3) If the evidence is taken down in a language different from that in which it has been given, and the witness does not understand the language in which it is taken down, the evidence so taken down shall be interpreted to him in the language in which it was given, or in a language which he understands.

361. (1) Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open Court in a language understood by him.

Interpretation of evidence to accused or his pleader.

(2) If he appears by pleader and the evidence is given in a language other than the language of the Court, and not understood by the pleader, it shall be interpreted to such pleader in that language.

(3) When documents are put in for the purpose of formal proof, it shall be in the discretion of the Court to interpret as much thereof as appears necessary.

362. (1) In every case in which a Presidency Magistrate imposes a fine exceeding two hundred rupees, or imprisonment for a term exceeding six months, he shall either take down the evidence of the witnesses with his own hand, or cause it to be taken down in writing from his dictation in open Court. All evidence so taken down shall be signed by the Magistrate, and shall form part of the record.

Record of evidence in Presidency Magistrates' Courts.

(2) Evidence so taken down shall ordinarily be recorded in the form of a narrative, but the Magistrate may, in his discretion, take down, or cause to be taken down, any particular question or answer.

(3) Sentences passed under Section 35 on the same occasion shall, for the purposes of this section, be considered as one sentence.

363. When a Sessions Judge or Magistrate has recorded the evidence of a witness he shall also record such remarks (if any) as he thinks material respecting the demeanour of such witness whilst under examination.

Remarks respecting demeanour of witness.

364. (1) Whenever the accused is examined by any Magistrate or by any Court other than a High Court established by Royal Charter or the Chief Court of the Punjab, the whole of such examination, including every question put to him and every answer given by him, shall be recorded in full, in the language in which he is examined, or, if that is not practicable, in the language of the Court or in English: and such record shall be shown or read to him, or, if he does not understand the language in which it is written, shall be interpreted to him in a language which he understands, and he shall be at liberty to explain or add to his answers.

Examination of accused how recorded.

(2) When the whole is made conformable to what he declares is the truth, the record shall be signed by the accused and the Magistrate or Judge of such Court, and such Magistrate or Judge shall certify under his own hand that the examination was taken in his presence and hearing, and that the record contains a full and true account of the statement made by the accused.

(3) In cases in which the examination of the accused is not recorded by the Magistrate or Judge himself, he shall be bound, unless he is a Presidency Magistrate, as the examination proceeds to make a memorandum thereof in the language of the Court, or in English, if he is sufficiently acquainted with the latter language; and such memorandum shall be written and signed by the Magistrate or Judge with his own hand, and shall be annexed to the record. If the Magistrate or Judge is unable to make a memorandum as above required, he shall record the reason of such inability.

(4) Nothing in this section shall be deemed to apply to the examination of an accused person under Section 263.

365. Every High Court established by Royal Charter and the Chief Court of the Punjab may, from time to time, by general rule, prescribe the manner in which evidence shall be taken down in cases coming before the Court, and the Judges of such Court shall take down the evidence or the substance thereof in accordance with the rule (if any) so prescribed.

CHAPTER XXVI.

OF THE JUDGMENT.

366. (1) The judgment in every trial in any Criminal Court of original jurisdiction shall be pronounced, or the substance of such judgment shall be explained,—

(a) in open Court either immediately after the termination of the trial or at some subsequent time of which notice shall be given to the parties or their pleaders, and

(b) in the language of the Court, or in some other language which the accused or his pleader understands :

Provided that the whole judgment shall be read out by the presiding Judge, if he is requested so to do either by the prosecution or the defence.

(2) The accused shall, if in custody, be brought up, or, if not in custody, be required by the Court to attend, to hear judgment delivered, except where his personal attendance during the trial has been dispensed with and the sentence is one of fine only or he is acquitted, in either of which cases it may be delivered in the presence of his pleader.

(3) No judgment delivered by any Criminal Court shall be deemed to be invalid by reason only of the absence of any party or his pleader on the day or from the place notified for the delivery thereof, or of any omission to serve, or defect in serving, on the parties or their pleaders, or any of them, the notice of such day and place.

(4) Nothing in this section shall be construed to limit in any way the extent of the provisions of Section 537. ;

367. (1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by the presiding officer of the Court in the language of the Court, or in

English; and shall contain the point or points for determination, the decision thereon and the reasons for the decision; and shall be dated and signed by the presiding officer in open Court at the time of pronouncing it.

(2) It shall specify the offence (if any) of which, and the section of the Indian Penal Code, XLV of 1860, or other law under which, the accused is convicted and the punishment to which he is sentenced.

(3) When the conviction is under the Indian Penal Code, XLV of 1860, and it is doubtful under which of two sections, or under which of two parts of the same section of that Code the offence falls, the Court shall distinctly express the same, and pass judgment in the alternative.

(4) If it be a judgment of acquittal, it shall state the offence of which the accused is acquitted, and direct that he be set at liberty.

(5) If the accused is convicted of an offence punishable with death, and the Court sentences him to any punishment other than death, the Court shall in its judgment state the reason why sentence of death was not passed:

Provided that, in trials by jury, the Court need not write a judgment, but the Court of Session shall record the heads of the charge to the jury.

368. (1) When any person is sentenced to death, the sentence shall direct that he be hanged by the neck till he is dead.

(2) No sentence of transportation shall specify the place to which the person sentenced is to be transported.

369. No Court, other than a High Court, when it has signed its judgment, shall alter or review the same, except as provided in Section 395 and 484, or to correct a clerical error.

370. Instead of recording a judgment in manner hereinbefore provided, a Presidency Magistrate shall record the following particulars:—

- (a) the serial number of the case;
- (b) the date of the commission of the offence;
- (c) the name of the complainant (if any);
- (d) the name of the accused person, and (except in the case of an European British subject) his parentage and residence;
- (e) the offence complained of or proved;
- (f) the plea of the accused and his examination (if any);
- (g) the final order;
- (h) the date of such order; and
- (i) in all cases in which the Magistrate inflicts imprisonment, or fine exceeding two hundred rupees, or both, a brief statement of the reasons for the conviction.

371. (1) On the application of the accused a copy of the judgment, or, when he so desires, a translation in his own language, if practicable, or in the language of the Court, shall be given to him without delay. Such copy shall, in any case other than a summons-case, be given free of cost.

(2) In trials by jury in a Court of Session, a copy of the heads of the charge to the jury shall, on the application of the accused, be given to him without delay and free of cost.

(3) When the accused is sentenced to death by a Sessions Judge, such Judge shall further inform him of the period within which, if he wishes to appeal, his appeal should be preferred.

Case of person sentenced to death.

372. The original judgment shall be filed with the record of proceedings, and, where the original is recorded in a different language from that of the Court, and the accused so requires, a translation thereof into the language of the Court shall be added to such record.

Judgment when to be translated.

373. In cases tried by the Court of Session, the Court shall forward a copy of its finding and sentence (if any) to the District Magistrate within the local limits of whose jurisdiction the trial was held.

Court of Session to send copy of finding and sentence to District Magistrate.

CHAPTER XXVII.

OF THE SUBMISSION OF SENTENCES FOR CONFIRMATION.

374. When the Court of Session passes sentence of death, the proceedings shall be submitted to the High Court and the sentence shall not be executed unless it is confirmed by the High Court.

Sentence of death to be submitted by Court of Session.

375. (1) If when such proceedings are submitted the High Court thinks that a further inquiry should be made into, or additional evidence taken upon, any point bearing upon the guilt or innocence of the convicted person, it may make such inquiry or take such evidence itself, or direct it to be made or taken by the Court of Session.

Power to direct further inquiry to be made or additional evidence to be taken.

(2) Such inquiry shall not be made, nor shall such evidence be taken in the presence of jurors or assessors, and, unless the High Court otherwise directs, the presence of the convicted person may be dispensed with when the same is made or taken.

(3) When the inquiry and the evidence (if any) are not made and taken by the High Court, the result of such inquiry and the evidence shall be certified to such Court.

Power of High Court to confirm sentence or annul conviction.

376. In any case submitted under section 374, whether tried with the aid of assessors or by jury, the High Court—

(a) may confirm the sentence, or pass any other sentence warranted by law : or

(b) may annul the conviction, and convict the accused of any offence of which the Sessions Court might have convicted him, or order a new trial on the same or an amended charge ; or

(c) may acquit the accused person :

Provided, that no order of confirmation shall be made under this section until the period allowed for preferring an appeal has expired, or, if an appeal is presented within such period, until such appeal is disposed of.

377. In every case so submitted, the confirmation of the sentence, or any new sentence or order passed by the High Court, shall be made, passed and signed by at least two of them.

Confirmation or new sentence to be signed by two Judges.

378. When any such case is heard before a Bench of Judges and such Judges are equally divided in opinion, the case, with their opinions thereon, shall be laid before another Judge, and such Judge, after such hearing as he thinks fit, shall deliver his opinion, and the judgment or order shall follow such opinion.

Procedure in case of difference of opinion.

379. In cases submitted by the Court of Session to the High Court for the confirmation of a sentence of death, the proper officer of the High Court shall without delay, after the order of confirmation or other order has been made by the High Court, send a copy of the order, under the seal of the High Court and attested with his official signature, to the Court of Session.

Procedure in cases submitted to High Court for confirmation.

380. When proceedings are submitted to a Magistrate of the first class or a Subdivisional Magistrate as provided by section 562, such Magistrate may thereupon pass such sentence or make such order as he might have passed or made if the case had originally been heard by him, and, if he thinks further inquiry or additional evidence on any point to be necessary, he may make such inquiry or take such evidence himself or direct such inquiry or evidence to be made or taken.

Procedure in cases submitted by Magistrate not empowered to act under section 562.

CHAPTER XXVII.

OF EXECUTION.

381. When a sentence of death passed by a Court of Session is submitted to the High Court for confirmation, such Court of Session shall, on receiving the order of confirmation or other order of the High Court thereon, cause such order to be carried into effect by issuing a warrant or taking such other steps as may be necessary.

Execution of order passed under Section 376.

382. If a woman sentenced to death is found to be pregnant, the High Court shall order the execution of the sentence to be postponed, and may, if it thinks fit, commute the sentence to transportation for life.

Postponement of capital sentence on pregnant woman.

383. Where the accused is sentenced to transportation or imprisonment in cases other than those provided for by Section 381, the Court passing the sentence shall forthwith forward a warrant to the jail in which he is, or is to be, confined, and, unless the accused is already confined in such jail, shall forward him to such jail, with the warrant.

Execution of sentences of transportation or imprisonment in other cases.

384. Every warrant for the execution of a sentence of imprisonment shall be directed to the officer in charge of the jail or other place in which the prisoner is, or is to be, confined.

Direction of warrant for execution.

385. When the prisoner is to be confined in a jail, the warrant shall be lodged with the jailor.

Warrant with whom to be lodged.

386. Whenever an offender is sentenced to pay a fine, the Court passing the sentence may, in its discretion, issue a warrant for the levy of the amount by distress and sale of any moveable property belonging to the offender, although the sentence directs that, in default of payment of the fine, the offender shall be imprisoned.

Warrant for levy of fine.

387. Such warrant may be executed within the local limits of the jurisdiction of such Court, and it shall authorise the distress and sale of any such property without such limits, when endorsed by the District Magistrate or Chief Presidency Magistrate within the local limits of whose jurisdiction such property is found.

388. (1) When an offender has been sentenced to fine only and to imprisonment in default of payment of the fine, and the Court issues a warrant under Section 386, it may suspend the execution of the sentence of imprisonment and may release the offender on his executing a bond, with or without sureties, as the Court thinks fit, conditioned for his appearance before such Court on the day appointed for the return to such warrant, such day not being more than fifteen days from the time of executing the bond; and in the event of the fine not having been realized the Court may direct the sentence of imprisonment to be carried into execution at once.

(2) In any case in which an order for the payment of money has been made, on non-recovery of which imprisonment may be awarded, and the money is not paid forthwith, the Court may require the person ordered to make such payment to enter into a bond as prescribed in sub-section (1), and in default of his so doing may at once pass sentence of imprisonment as if the money had not been recovered.

389. Every warrant for the execution of any sentence may be issued either by the Judge or Magistrate who passed the sentence, or by his successor in office.

390. When the accused is sentenced to whipping only, the sentence shall be executed at such place and time as the Court may direct.

391. (1) When the accused is sentenced to whipping in addition to imprisonment in a case which is subject to appeal, the whipping shall not be inflicted until fifteen days from the date of the sentence, or, if an appeal is made within that time, until the sentence is confirmed by the Appellate Court; but the whipping shall be inflicted as soon as practicable after the expiry of the fifteen days, or, in case of an appeal, as soon as practicable after the receipt of the order of the Appellate Court confirming the sentence.

(2) The whipping shall be inflicted in the presence of the officer in charge of the jail, unless the Judge or Magistrate orders it to be inflicted in his own presence.

(3) No accused person shall be sentenced to whipping in addition to imprisonment when the term of imprisonment to which he is sentenced is less than three months.

392. (1) In the case of a person of or over sixteen years of age, whipping shall be inflicted with a light ratan not less than half an inch in diameter, in such mode, and on such part of the person, as the Local Government directs; and, in the case of a person under sixteen years of age, it shall be inflicted in such mode, and on such part of the person, and with such instrument, as the Local Government directs.

(2) In no case shall such punishment exceed thirty stripes.

Not to be executed by instalments.

Exemptions.

(a) females ;

(b) males sentenced to death, or to transportation, or to penal servitude or to imprisonment for more than five years ;

(c) males whom the Court considers to be more than forty-five years of age.

394. (1) The punishment of whipping shall not be inflicted unless a Medical Officer, if present, certifies, or, if there is not a Medical Officer present, unless it appears to the Magistrate or officer present, that the offender is in a fit state of health to undergo such punishment.

(2) If, during the execution of a sentence of whipping a Medical Officer certifies, or it appears to the Magistrate or officer present, that the offender is not in a fit state of health to undergo the remainder of the sentence, the whipping shall be finally stopped.

395. (1) In any case in which, under Section 394, a sentence of whipping is, wholly or partially, prevented from being executed, the offender shall be kept in custody till the Court which passed the sentence can revise it; and the said Court may, at its discretion, either remit such sentence, or sentence the offender in lieu of whipping, or in lieu of so much of the sentence of whipping as was not executed, to imprisonment for any term not exceeding twelve months, which may be in addition to any other punishment which he may have been sentenced for the same offence.

(2) Nothing in this section shall be deemed to authorise any Court to inflict imprisonment for a term exceeding that to which the accused is liable by law, or that which the said Court is competent to inflict.

396. (1) When sentence is passed under this Code on an escaped convict, such sentence, if of death, fine or whipping, shall, subject to the provisions hereinbefore contained, take effect immediately, and, if of imprisonment, penal servitude or transportation, shall take effect according to the following rules, that is to say :—

(2) If the new sentence is severer in its kind than the sentence which such convict was undergoing when he escaped, the new sentence shall take effect immediately.

(3) When the new sentence is not severer in its kind than the sentence the convict was undergoing when he escaped, the new sentence shall take effect after he has suffered imprisonment, penal servitude or transportation, as the case may be, for a further period equal to that which, at the time of his escape, remained unexpired of his former sentence.

Explanation.—For the purposes of this section—

(a) a sentence of transportation or penal servitude shall be deemed severer than a sentence of imprisonment ;

(b) a sentence of imprisonment with solitary confinement shall be deemed severer than a sentence of the same description of imprisonment without solitary confinement ; and

- (c) a sentence of rigorous imprisonment shall be deemed severer than a sentence of simple imprisonment with or without solitary confinement.

397. When a person already undergoing a sentence of imprisonment, Sentence on offender penal servitude or transportation is sentenced to already sentenced for imprisonment, penal servitude or transportation, another offence. such imprisonment, penal servitude or transportation shall commence at the expiration of the imprisonment, penal servitude or transportation to which he has been previously sentenced :

Provided that if he is undergoing a sentence of imprisonment, and the sentence on such subsequent conviction is one of transportation, the Court may, in its discretion, direct that the latter sentence shall commence immediately or at the expiration of the imprisonment to which he has been previously sentenced.

398. (1) Nothing in Section 396 or Section 397 shall be held to excuse any Saving as to Sections 396 person from any part of the punishment to which he is and 397. liable upon his former or subsequent conviction.

(2) When an award of imprisonment in default of payment of a fine is annexed to a substantive sentence of imprisonment, or to a sentence of transportation or penal servitude for an offence punishable with imprisonment, and the person undergoing the sentence is after its execution to undergo a further substantive sentence, or further substantive sentences of imprisonment, transportation or penal servitude, effect shall not be given to the award of imprisonment in default of payment of the fine until the person has undergone the further sentence or sentences.

399. (1) When any person under the age of fifteen years is sentenced by any Criminal Court to imprisonment for any offence, the Court may direct that such person, instead of being imprisoned in a criminal jail, shall be confined in any reformatory established by the Local Government as a fit place for confinement, in which there are means of suitable discipline and of training in some branch of useful industry or which is kept by a person willing to obey such rules as the Local Government prescribes with regard to the discipline and training of persons confined therein.

(2) All persons confined under this section shall be subject to the rules so prescribed.

(3) This section shall not apply to any place in which the Reformatory Schools Act, VII of 1897, is for the time being in force.

400. When a sentence has been fully executed the officer executing it shall Return of warrant on execution of sentence. with an endorsement under his hand certifying the manner in which the sentence has been executed.

CHAPTER XXIX.

OF SUSPENSIONS, REMISSIONS AND COMMUTATIONS OF SENTENCES.

401. (1) When any person has been sentenced to punishment for an offence, the Governor-General in Council or the Local Government may at any time, without conditions or upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced.

(2) Whenever an application is made to the Governor-General in Council or the Local Government for the suspension or remission of a sentence, the Governor-General in Council or the Local Government, as the case may be, may require the presiding Judge of the Court before or by which the conviction was had or confirmed to state his opinion as to whether the application should be granted or refused, together with his reasons for such opinion.

(3) If any condition on which a sentence has been suspended or remitted is, in the opinion of the Governor-General in Council or of the Local Government, as the case may be, not fulfilled, the Governor-General in Council or the Local Government may cancel the suspension or remission, and thereupon the person in whose favour the sentence has been suspended or remitted may, if at large, be arrested by any police officer without warrant and remanded to undergo the unexpired portion of the sentence.

(4) The condition on which a sentence is suspended or remitted under this section may be one to be fulfilled by the person in whose favour the sentence is suspended or remitted, or one independent of his will.

(5) Nothing herein contained shall be deemed to interfere with the right of Her Majesty to grant pardons, reprieves, respites or remissions of punishment.

(6) The Governor-General in Council and the Local Government may, by general rules or special orders, give directions as to the suspension of sentences and the conditions on which petitions should be presented and dealt with.

402. The Governor-General in Council or the Local Government may, without the consent of the person sentenced, commute any one of the following sentences for any other mentioned after it :—

Power to commute punishment.

death, transportation, penal servitude, rigorous imprisonment for a term not exceeding that to which he might have been sentenced, simple imprisonment for a like term, fine.

CHAPTER XXX.

OF PREVIOUS ACQUITTALS OR CONVICTIONS.

403. (1) A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under Section 236, or for which he might have been convicted under Section 237.

Person once convicted or acquitted not to be tried for same offence.

(2) A person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under Section 235, sub-section (1).

(3) A person convicted of any offence constituted by any act causing consequences which, together with such act, constituted a different offence from that of which he was convicted may be afterwards tried for such last-mentioned offence, if the consequences had not happened, or were not known to the Court to have happened, at the time when he was convicted.

(4) A person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction, be subsequently charged

with, and tried for, any other offence constituted by the same acts which he may have committed, if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged.

(5) Nothing in this section shall affect the provisions of Section 26 of the General Clauses Act, X of 1897, or of Section 188 of this Code.

Explanation.—The dismissal of a complaint, the stopping of proceedings under Section 249, the discharge of the accused or any entry made upon a charge under Section 273, is not an acquittal for the purposes of this section.

Illustrations.

(a) A is tried upon a charge of theft as a servant and acquitted. He cannot afterwards, while the acquittal remains in force, be charged with theft as a servant, or, upon the same facts, with theft simply, or with criminal breach of trust.

(b) A is tried upon a charge of murder and acquitted. There is no charge of robbery; but it appears from the facts that A committed robbery at the time when the murder was committed; he may afterwards be charged with, and tried for, robbery.

(c) A is tried for causing grievous hurt and convicted. The person injured afterwards dies. A may be tried again for culpable homicide.

(d) A is charged before the Court of Session and convicted of the culpable homicide of B. A may not afterwards be tried on the same facts for the murder of B.

(e) A is charged by a Magistrate of the first class with, and convicted by him of, voluntarily causing hurt to B. A may not afterwards be tried for voluntarily causing grievous hurt to B on the same facts, unless the case comes within paragraph 3 of the section.

(f) A is charged by a Magistrate of the second class with, and convicted by him of, theft of property from the person of R. A may be subsequently charged with, and tried for, robbery on the same facts.

(g) A, B and C are charged by a Magistrate of the first class with, and convicted by him of, robbing D. A, B and C may afterwards be charged with, and tried for, dacoity on the same facts.

PART VII.—OF APPEAL, REFERENCE AND REVISION.

CHAPTER XXXI.

OF APPEALS.

404. No appeal shall lie from any judgment or order of a Criminal Court except as provided for by this Code or by any other law for the time being in force.
Unless otherwise provided, no appeal to lie.

405. Any person whose application under Section 89 for the delivery of property or the proceeds of the sale thereof has been rejected by any Court may appeal to the Court to which appeals ordinarily lie from the sentences of the former Court.
Appeal from order rejecting application for restoration of attached property.

406. Any person ordered by a Magistrate other than the District Magistrate or a Presidency Magistrate, to give security for good behaviour under Section 118 may appeal to the District Magistrate.
Appeal from order requiring security for good behaviour.

407. (1) Any person convicted on a trial held by any Magistrate of the second or third class, or any person sentenced under Section 349 by a Subdivisional Magistrate of the second class, may appeal to the District Magistrate.
Appeal from sentence of Magistrate of the second third class.

(2) The District Magistrate may direct that any appeal under this section, or any class of such appeals, shall be heard by any Magistrate of the first class subordinate to him and empowered by the Local Government to hear such appeals, and thereupon such appeal or class of appeals may be presented to such subordinate Magistrate, or, if already presented to the District Magistrate, may be transferred to such subordinate Magistrate. The District Magistrate may withdraw from such Magistrate any appeal or class of appeals so presented or transferred.

408. Any person convicted on a trial held by an Assistant Sessions Judge, a District Magistrate or other Magistrate of the first class, or any person sentenced under Section 349 by a Magistrate of the first class may appeal to the Court of Session

Appeal from sentence of Assistant Sessions Judge or Magistrate of the first class.

Provided as follows :—

- (a) any European British subject so convicted may, at his option, appeal either to the High Court or the Court of Session ;
- (b) when in any case an Assistant Sessions Judge or a Magistrate specially empowered under Section 30 passes any sentence of imprisonment for a term exceeding four years, or any sentence of transportation, the appeal shall lie to the High Court ;
- (c) when any person is convicted by a Magistrate of an offence under Section 124A of the Indian Penal Code, XLV of 1860, the appeal shall lie to the High Court.

409. An appeal to the Court of Session or Sessions Judge shall be heard by the Sessions Judge or by an Additional Sessions Judge.

Appeals to Court of Session how heard.

410. Any person convicted on a trial held by a Sessions Judge, or an Additional Sessions Judge, may appeal to the High Court.

Appeal from sentence of Court of Session.

411. Any person convicted on a trial held by a Presidency Magistrate may appeal to the High Court, if the Magistrate has sentenced him to imprisonment for a term exceeding six months or to fine exceeding two hundred rupees.

Appeal from sentence of Presidency Magistrate.

124. Notwithstanding anything hereinbefore contained, where an accused person has pleaded guilty and has been convicted by a Court of Session or any Presidency Magistrate or Magistrate of the first class on such plea, there shall be no appeal except as to the extent or legality of the sentence.

No appeal in certain cases when accused pleads guilty.

413. Notwithstanding anything hereinbefore contained, there shall be no appeal by a convicted person in cases in which a Court of Session or the District Magistrate or other Magistrate of the first class passes a sentence of imprisonment not exceeding one month only, or of fine not exceeding fifty rupees only, or of whipping only.

No appeal in petty cases.

Explanation.—There is no appeal from a sentence of imprisonment passed by such Court or Magistrate in default of payment of fine when no substantive sentence of imprisonment has also been passed.

414. Notwithstanding anything hereinbefore contained, there shall be no appeal by a convicted person in any case tried summarily in which a Magistrate empowered to act under Section 260 passes a sentence of imprisonment not exceeding three months only, or of fine not exceeding two hundred rupees only, or of whipping only.

No appeal from certain summary convictions.

415. An appeal may be brought against any sentence referred to in Section 413 or Section 414 by which any two or more of the punishments therein mentioned are combined, but no sentence which would not otherwise be liable to appeal shall be appealable merely on the ground that the person convicted is ordered to find security to keep the peace.

Proviso to Sections 413 and 414.

Explanation.—A sentence of imprisonment in default of payment of fine is not a sentence by which two or more punishments are combined within the meaning of this section.

416. Nothing in Sections 413 and 414 applies to appeals from sentences passed under Chapter XXXIII on European British subjects.

Saving of sentences on European British subjects.

417. The Local Government may direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court.

Appeal on behalf of Government in case of acquittal.

418. An appeal may lie on a matter of fact as well as a matter of law except where the trial was by jury, in which case the appeal shall lie on a matter of law only.

Appeal on what matters admissible.

Explanation.—The alleged severity of a sentence shall, for the purposes of this section, be deemed to be a matter of law.

419. Every appeal shall be made in the form of a petition in writing presented by the appellant or his pleader, and every such petition shall (unless the Court to which it is presented otherwise directs) be accompanied by a copy of the judgment or order appealed against, and, in cases tried by a jury, a copy of the heads of the charge recorded under Section 367.

Petition of appeal.

420. If the appellant is in jail, he may present his petition of appeal and the copies accompanying the same to the officer in charge of the jail, who shall thereupon forward such petition and copies to the proper Appellate Court.

Procedure when appellant in jail.

421. (1) On receiving the petition and copy under Section 419 or Section 420, the Appellate Court shall peruse the same, and, if it considers that there is no sufficient ground for interfering, it may dismiss the appeal summarily :

Summary dismissal of appeal.

Provided that no appeal presented under Section 419 shall be dismissed unless the appellant or his pleader has had a reasonable opportunity of being heard in support of the same.

(2) Before dismissing an appeal under this section, the Court may call for the record of the case, but shall not be bound to do so.

422. If the Appellate Court does not dismiss the appeal summarily, it shall cause notice to be given to the appellant or his pleader, and to such officer as the Local Government may appoint in this behalf, of the time and place at which such appeal will be heard, and shall, on the application of such officer, furnish him with a copy of the grounds of appeal ;

and, in cases of appeals under Section 417 the Appellate Court shall cause a like notice to be given to the accused.

423. (1) The Appellate Court shall then send for the record of the case, if such record is not already in Court. After perusing such record, and hearing the appellant or his pleader, if he appears, and, the Public Prosecutor, if he appears, and, in case of an appeal under Section 417, the accused, if he appears, the Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may—

- (a) in an appeal from an order of acquittal, reverse such order and direct that further inquiry be made, or that the accused be re-tried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law ;
- (b) in an appeal from a conviction, (1) reverse the finding and sentence, and acquit or discharge the accused, or order him to be re-tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or (2) alter the finding, maintaining the sentence, or, with or without altering the finding, reduce the sentence, or, (3) with or without such reduction and with or without altering the finding, alter the nature of the sentence but, subject to the provisions of Section 106, sub-section (3), not so as to enhance the same ;
- (c) in an appeal from any other order, alter or reverse such order ;
- (d) make any amendment or any consequential or incidental order that may be just or proper.
- (e) Nothing herein contained shall authorise the Court to alter or reverse the verdict of a jury, unless it is of opinion that such verdict is erroneous owing to a misdirection by the Judge, or to a misunderstanding on the part of the jury of the law as laid down by him.

424. The rules contained in Chapter XXVI as to the judgment of a Criminal Court of original jurisdiction shall apply, so far as may be practicable, to the judgment of any Appellate Court other than a High Court :

Provided that, unless the appellate Court otherwise directs, the accused shall not be brought up, or required to attend, to hear judgment delivered.

425. (1) Whenever a case is decided on appeal by the High Court under this Chapter, it shall certify its judgment or order to the Court by which the finding, sentence or order appealed against was recorded or passed. If the finding, sentence or order was recorded or passed by a Magistrate other than the District Magistrate, the certificate shall be sent through the District Magistrate.

(2) The Court to which the High Court certifies its judgment or order shall thereupon make such orders as are conformable to the judgment or order of the High Court ; and, if necessary, the record shall be amended in accordance therewith.

426. (1) Pending any appeal by a convicted person, the Appellate Court may, for reasons to be recorded by it in writing, order suspension of sentence pending appeal. Release of appellant on bail. that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail or on his own bond.

(2) The power conferred by this section on an Appellate Court may be exercised also by the High Court in the case of any appeal by a convicted person to a Court subordinate thereto.

(3) When the appellant is ultimately sentenced to imprisonment, penal servitude or transportation, the time during which he is so released shall be excluded in computing the term for which he is so sentenced.

427. When an appeal is presented under Section 417, the High Court may issue a warrant directing that the accused be arrested and brought before it or any subordinate Court, and the Court before which he is brought may commit him to prison pending the disposal of the appeal, or admit him to bail.

428. (1) In dealing with any appeal under this chapter, the Appellate Court may, if it thinks additional evidence to be necessary, take further evidence or direct it to be taken. shall record its reasons, and may either take such evidence itself, or direct it to be taken by a Magistrate, or, when the Appellate Court is a High Court, by a Court of Session or a Magistrate.

(2) When the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the Appellate Court, and such Court shall thereupon proceed to dispose of the appeal.

(3) Unless the Appellate Court otherwise directs, the accused or his pleader shall be present when the additional evidence is taken; but such evidence shall not be taken in the presence of jurors or assessors.

(4) The taking of evidence under this section shall be subject to the provisions of Chapter XXV, as if it were an inquiry.

429. When the Judges composing the Court of Appeal are equally divided in opinion, the case, with their opinions thereon, shall be laid before another Judge of the same Court, and such Judge, after such hearing (if any) as he thinks fit, shall deliver his opinion, and the judgment or order shall follow such opinion.

430. Judgments and orders passed by an Appellate Court upon appeal shall be final, except in the cases provided for in Section 417 and Chapter XXXII.

431. Every appeal under Section 417 shall finally abate on the death of the accused, and every other appeal under this chapter (except an appeal from a sentence of fine) shall finally abate on the death of the appellant.

CHAPTER XXXII.

OF REFERENCE AND REVISION.

432. A Presidency Magistrate may, if he thinks fit, refer for the opinion of the High Court any question of law which arises in the hearing of any case pending before him, or may give judgment in any such case subject to the opinion of the High Court.

decision of the High Court on such reference, and pending such decision, may either commit the accused to jail, or release him on bail to appear for judgment when called upon.

433. (1) When a question has been so referred, the High Court shall pass such order thereon as it thinks fit, and shall cause a copy of such order to be sent to the Magistrate by whom the reference was made, who shall dispose of the case conformably to the said order.

Direction as to costs.

(2) The High Court may direct by whom the costs of such reference shall be paid.

434. (1) When any person has, in a trial before a Judge of a High Court consisting of more Judges than one and acting in the exercise of its original criminal jurisdiction, been convicted of an offence, the Judge, if he thinks fit, may reserve and refer for the decision of a Court consisting of two or more Judges of such Court any question of law which has arisen in the course of the trial of such person, and the determination of which would affect the event of the trial.

(2) If the Judge reserves any such question, the person convicted shall, pending the decision thereon, be remanded to jail, or, if the Judge thinks fit, be admitted to bail; and the High Court shall have power to review the case, or such part of it as may be necessary, and finally determine such question, and thereupon to alter the sentence passed by the Court of original jurisdiction, and to pass such judgment or order as the High Court thinks fit.

435. (1) The High Court or any Sessions Judge or District Magistrate or any Subdivisional Magistrate empowered by the Local Government in this behalf, may call for and examine the record of any proceeding before any inferior Criminal Court situate within the local limits of its or his jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such inferior Court.

(2) If any Subdivisional Magistrate acting under sub-section (1) considers that any such finding, sentence or order is illegal or improper, or that any such proceedings are irregular, he shall forward the record, with such remarks thereon as he thinks fit, to the District Magistrate.

(3) Orders made under Sections 143 and 144 and proceedings under Chapter XII and Section 176 are not proceedings within the meaning of this section.

(4) If an application under this section has been made either to the Sessions Judge or District Magistrate, no further application shall be entertained by the other of them.

436. When, on examining the record of any case under Section 435 or otherwise, the Sessions Judge or District Magistrate considers that such case is triable exclusively by the Court of Session and that an accused person has been improperly discharged by the inferior Court, the Sessions Judge or District Magistrate may cause him to be arrested, and may thereupon, instead of directing a fresh inquiry, order him to be committed for trial upon the matter of which he has been, in the opinion of the Sessions Judge or District Magistrate, improperly discharged:

Provided as follows :—

- (a) that the accused has had an opportunity of showing cause to such Judge or Magistrate why the commitment should not be made ;
- (b) that, if such Judge or Magistrate thinks that the evidence shows that some other offence has been committed by the accused, such Judge or Magistrate may direct the inferior Court to inquire into such offence.

437. On examining any record under Section 435 or otherwise, the High Court or the Sessions Judge may direct the District Magistrate by himself or by any of the Magistrates subordinate to him to make, and the District Magistrate may himself make, or direct any subordinate Magistrate to make, further inquiry into any complaint which has been dismissed under Section 203 or sub-section (3) of Section 204 or into the case of any accused person who has been discharged.

438. (1) The Sessions Judge or District Magistrate may, if he thinks fit, on examining under Section 435 or otherwise the record of any proceeding, report for the orders of the High Court the result of such examination, and, when such report contains a recommendation that a sentence be reversed or altered, may order that the execution of such sentence be suspended, and, if the accused is in confinement, that he be released on bail or on his own bond.

(2) An Additional Sessions Judge shall have and may exercise all the powers of a Sessions Judge under this chapter in respect of any case which may be transferred to him by the Sessions Judge.

439. (1) In the case of any proceeding the record of which has been called for by itself or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by Sections 195, 423, 426, 427 and 428, or on a Court by Section 338, and may enhance the sentence ; and, when the Judges composing the Court of Revision are equally divided in opinion, the case shall be disposed of in manner provided by Section 429.

(2) No order under this section shall be made to the prejudice of the accused unless he has had an opportunity of being heard either personally or by pleader in his own defence.

(3) Where the sentence dealt with under this section has been passed by a Magistrate acting otherwise than under Section 34, the Court shall not inflict a greater punishment for the offence which in the opinion of such Court, the accused has committed than might have been inflicted for such offence by a Presidency Magistrate or a Magistrate of the first class.

(4) Nothing in this section applies to an entry made under Section 273, or shall be deemed to authorise a High Court to convert a finding of acquittal into one of conviction.

(5) Where under this Code an appeal lies and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed.

Optional with Court to hear parties.

440. No party has any right to be heard either personally or by pleader before any Court when exercising its powers of revision :

Provided that the Court may, if it thinks fit, when exercising such powers hear any party either personally or by pleader, and that nothing in this section shall be deemed to affect Section 439, sub-section (2).

441. When the record of any proceeding of any Presidency Magistrate is called for by the High Court under Section 435, the Magistrate may submit with the record a statement setting forth the grounds of his decision or order and any facts which he thinks material to the issue; and such statement before over-ruling or setting aside the said decision or order.

442. When a case is revised under this chapter by the High Court, it shall, in manner hereinbefore provided by Section 425, certify its decision or order to the Court by which the finding, sentence or order revised was recorded or passed, and the Court or Magistrate to which the decision or order is so certified shall thereupon make such orders as are conformable to the decision so certified; and, if necessary, the record shall be amended in accordance therewith.

PART VIII.—SPECIAL PROCEEDINGS.

CHAPTER XXXIII.

CRIMINAL PROCEEDINGS AGAINST EUROPEANS AND AMERICANS.

443. No Magistrate, unless he is a Justice of the Peace, and (except in the case of a District Magistrate or Presidency Magistrate) unless he is a Magistrate of the first class and an European British subject, shall inquire into or try any charge against an European British subject.

444. No Judge presiding in a Court of Session, except the Sessions Judge, shall exercise jurisdiction over an European British subject unless he himself is an European British subject; and if he is an Assistant Sessions Judge, unless he has held the office of Assistant Sessions Judge for at least three years, and has been specially empowered in this behalf by the Local Government.

445. Nothing in Section 443 or Section 444 shall prevent any Magistrate from taking cognizance of an offence committed by any European British subject in any case in which he could take cognizance of a like offence if committed by another person:

Provided that, if he issue any process for the purpose of compelling the appearance of an Europeans British subject accused of an offence, such process shall be made returnable before a Magistrate having jurisdiction to inquire into or try the case.

446. Notwithstanding anything contained in Section 32 or Section 34, no Magistrate other than a District Magistrate or Presidency Magistrate shall pass any sentence on an European British subject other than imprisonment for a term which may extend to three months, or fine which may extend to one thousand rupees, or both, and a District Magistrate shall not pass any such sentence other than imprisonment for a term which may extend to six months, or fine which may extend to two thousand rupees, or both.

447. (1) When an European British subject is accused of an offence before a Magistrate, and such offence cannot, in the opinion of such Magistrate, be adequately punished by him, and is not punishable with death or with transportation for life, such Magistrate shall, if he thinks that the accused ought to be committed, commit him to the Court of Session, or, in the case of a Presidency Magistrate, to the High Court.

(2) When the offence which appears to have been committed is punishable with death or with transportation for life, the commitment shall be to the High Court.

448. Where any person committed to the High Court under Section 447 is charged with several offences of which one is punishable with death or transportation for life and the others with a less punishment, and the High Court considers that he should not be tried for the offence punishable with death or transportation, the High Court may nevertheless try him for the other offences.

449. (1) Notwithstanding anything contained in Section 31, no Court of Session shall pass on any European British subject any sentence other than a sentence of imprisonment for a term which may extend to one year, or fine, or both.

(2) If, at any time after the commitment and before signing judgment, the presiding Judge thinks that the offence which appears to be proved cannot be adequately punished by such a sentence, he shall record his opinion to that effect and transfer the case to the High Court. Such Judge may either himself bind over, or direct the committing Magistrate to bind over, the complainant and witnesses to appear before the High Court.

450. (1) In trials of European British subjects before a High Court or Court of Session, if, before the first juror is called and accepted, or the first assessor is appointed, as the case may be, any such subject requires to be tried by a mixed jury, the trial shall be by a jury of which not less than half the number shall be Europeans or Americans, or both Europeans and Americans.

(2) When any such trial before a Court of Session would in the ordinary course be with the aid of assessors, the European British subject accused, or, where there are several European British subjects accused, all of them jointly, may, instead of claiming to be tried by a mixed jury under sub-section (1), require that not less than half the number of the assessors shall be Europeans or Americans or both Europeans and Americans.

451. (1) In trials of European British subjects before a District Magistrate for any offence, any such subject may, in a summons-case before he is heard in his defence under Section 244, or in a warrant-case before he enters on his defence under Section 256, claim that the trial shall be by a jury composed in manner prescribed by Section 450.

(2) If a claim is made under sub-section (1) in a summons-case at the time when the Magistrate proceeds under Section 244 to hear the accused, or in

a warrant-case at the time when the Magistrate calls upon the accused under Section 256 to enter upon the defence, the Magistrate shall forthwith issue the necessary orders for the trial by a jury as aforesaid.

(3) If such a claim is made at an earlier stage of the proceedings, the Magistrate shall issue such orders whenever it appears to him from the evidence recorded that there will be a sufficient case to go before a jury.

(4) In every such case the Magistrate shall, notwithstanding anything contained in Section 242, before issuing any orders as aforesaid, frame a formal charge.

(5) The provisions of Sections 211, 216, 217, 219 and 220 shall, so far as may be, apply for the purpose of securing the attendance of the complainant, the accused and the witnesses at every trial to be held under this section.

(6) The provisions of this Code relating to the procedure in a trial by jury before a Court of Session shall, as nearly as may be, apply to every trial under this section as if the District Magistrate were a Sessions Judge and the accused had been committed to his Court for trial.

(7) All Courts may construe any of the provisions referred to in sub-section (5) or sub-section (6), in so far as they are made applicable by those sub-sections, with such verbal alterations not affecting the substance as may be necessary or proper to adapt the same to the matter before them.

(8) Nothing in this section shall affect the power of the Magistrate to commit an accused person for trial under Section 347 or Section 447.

(9) If an accused person claims to be tried by jury under this section and in the opinion of the District Magistrate there is reason to believe that a jury composed in manner prescribed by Section 450 cannot be constituted for the trial before himself, or cannot be so constituted without an amount of delay, expense or inconvenience which under the circumstances of the case would be unreasonable, he may, instead of issuing orders for the trial before himself under this section, transfer the case for trial to such other District Magistrate or to such Sessions Judge as the High Court may, from time to time, by rules made by it in this behalf and approved by the Local Government, or by special order, direct.

(10) When a case is transferred under this section to a Sessions Judge or District Magistrate, he shall with all convenient speed try it with the same powers (including the power of commitment) and according to the same procedure as if he were a District Magistrate acting under this section.

452. In any case in which an European British subject is accused jointly with a person not being an European British subject, and such European British subject is committed for trial before a High Court or Court of Session, such subject and person may be tried together, and the procedure on the trial shall be the same as it would have been had the European British subject been tried separately:

Provided that, if the European British subject requires under Section 450 to be tried by a mixed jury, or by a mixed set of assessors, and the person not being an European British subject requires that he shall be tried separately, the latter person shall be tried separately in accordance with the provisions of Chapter XXIII.

453. (1) When any person claims to be dealt with as an European British subject, he shall state the grounds of such claim to the Magistrate before whom he is brought for the purposes of the inquiry or trial; and such Magistrate shall inquire into the truth of such statement, and allow the person making it a reasonable time within which to prove that it is true, and shall then decide whether he is or is not an European British subject, and shall deal with him accordingly. If any such person is convicted by such Magistrate and appeals from such conviction, the burden of proving that the Magistrate's said decision was wrong shall lie upon him.

(2) When any such person is committed by the Magistrate for trial before the Court of Session, and such person before such Court claims to be dealt with as an European British subject, such Court shall, after such further enquiry, if any, as it thinks fit, decide whether he is or is not an European British subject, and shall deal with him accordingly. If he is convicted by such Court and appeals from such conviction, the burden of proving that the Court's said decision was wrong shall lie upon him.

(3) When the Court before which any person is tried decides that he is not an European British subject, such decision shall form a ground of appeal from the sentence or order passed in such trial.

454. (1) If an European British subject does not claim to be dealt with as such by the Magistrate before whom he is tried or by whom he is committed, or if, when such claim has been made before, and disallowed by, the committing Magistrate, it is not again made before the Court to which such subject is committed, he shall be held to have relinquished his right to be dealt with as such European British subject, and shall not assert it in any subsequent stage of the same case.

(2) Unless the Magistrate has reason to believe that any person brought before him is not an European British subject, the Magistrate shall ask such person whether he is such a subject or not.

455. Where a person who is not an European British subject is dealt with as such under this chapter and does not object, the inquiry, commitment, trial or sentence (as the case may be) shall not, by reason of such dealing, be invalid.

456. When any European British subject is unlawfully detained in custody by any person, such European British subject or any person on his behalf may apply to the High Court which would have jurisdiction over such European British subject in respect of any offence committed by him at the place where he is detained, or to which he would be entitled to appeal from any conviction for any such offence, for an order directing the person detaining him to bring him before the High Court to abide such further order as it may pass.

457. The High Court, if it thinks fit, may, before issuing such order, inquire, on affidavit or otherwise, into the grounds on which it is applied for, and grant or refuse such application; or it may issue the order in the first instance, and, when the person applying for it is brought before it, it may make such further order in the case as it thinks fit, after such inquiry (if any) as it thinks necessary.

458. The High Court may issue such orders throughout the territories within the local limits of its appellate criminal jurisdiction, and such other territories as the Governor-General in Council may direct.

Territories throughout which High Court may issue such orders.

459. (1) Unless there is something repugnant in the context all enactments heretofore or hereafter made by the Governor-General in Council, which confer on Magistrates or on the Court of Session jurisdiction over offences, shall be deemed to apply to European British subjects, although such persons are not expressly referred to therein.

Application of Acts conferring jurisdiction on Magistrates or Courts of Session.

(2) Nothing in this section shall be deemed to authorise any Court to exceed the limits prescribed by this chapter as to the amount of punishment which it may inflict on an European British subject, or to confer jurisdiction on any Magistrate or any Judge presiding in a Court of Session, not being a Justice of the Peace.

460. In every case triable by jury or with the aid of assessors, in which an European (not being an European British subject) or an American is the accused person, or one of the accused persons, not less than half the number of jurors or assessors, shall, if practicable and if such European or American so claims, be Europeans or Americans.

Jury for trial of Europeans or Americans.

461. Whenever an European or American is charged before the Court of Session jointly with a person not an European or American and in compliance with a claim made under Section 460 is tried by a jury, or with the aid of a set of assessors, of which at least one-half consists of Europeans and Americans, the latter person shall, if he so claims, be tried separately.

Jury when European or American charged jointly with one of another race.

462. (1) When a trial is to be held before the Court of Session in which the accused person, or one of the accused persons, is entitled to be tried by a jury constituted under the provisions of Section 450 or Section 460, or before the Court of a District Magistrate or Sessions Judge proceeding under Section 451, the Court shall, three days at least before the day fixed for holding such trial, cause to be summoned, in the manner hereinbefore prescribed, as many European and American jurors as are required for the trial.

Summoning and empanelling jurors under Section 450, 451, or 460.

(2) The Court shall also, at the same time, in like manner, cause to be summoned the same number of other persons named in the revised list, unless such number of such other persons has been already summoned for trials by jury at that Session.

(3) From the whole number of persons returned the jurors who are to constitute the jury shall be chosen by lot in the manner prescribed in Section 276, until a jury containing the proper number of Europeans or Americans, or a number approaching thereto as nearly as practicable, has been obtained :

Provided that, in any case in which the proper number of Europeans and Americans cannot otherwise be obtained, the Court may, in its discretion, for the purpose of constituting the jury, summon any person excluded from the list on the ground of his being exempted under Section 320.

463. Criminal proceedings against European British subjects, Europeans not being European British subjects, and Americans, before the Court of Session and High Court, shall, except as otherwise expressly provided, be conducted according to the provisions of this Code.
- Conduct of criminal proceedings against European British subjects, etc.

CHAPTER XXXIV.

LUNATICS.

464. (1) When a Magistrate holding an inquiry or a trial has reason to believe that the accused is of unsound mind and consequently incapable of making his defence, the Magistrate shall inquire into the fact of such unsoundness, and shall cause such person to be examined by the Civil Surgeon of the district or such other medical officer as the Local Government directs, and thereupon shall examine such Surgeon or other officer as a witness, and shall reduce the examination to writing.
- Procedure in case of accused being lunatic.

- (2) If such Magistrate is of opinion that the accused is of unsound mind and consequently incapable of making his defence, he shall postpone further proceedings in the case.

465. (1) If any person committed for trial before a Court of Session or a High Court appears to the Court at his trial to be of unsound mind and consequently incapable of making his defence, the jury, or the Court with the aid of assessors, shall, in the first instance, try the fact of such unsoundness and incapacity, and, if satisfied of the fact, shall pass judgment accordingly, and thereupon the trial shall be postponed.
- Procedure in case of person committed before Court of Session or High Court being lunatic.

- (2) The trial of the fact of the unsoundness of mind and incapacity of the accused shall be deemed to be part of his trial before the Court.

466. (1) Whenever an accused person is found to be of unsound mind and incapable of making his defence, the Magistrate or Court, as the case may be, if the case is one in which bail may be taken, may release him on sufficient security being given that he shall be properly taken care of, and shall be prevented from doing injury to himself or to any other person, and for his appearance when required before the Magistrate or Court, or such officer as the Magistrate or Court appoints in this behalf.
- Release of lunatic pending investigation or trial.

- (2) If the case is one in which bail may not be taken, or if sufficient security is not given, the Magistrate or Court shall report the case to the Local Government, remanding the accused to custody pending orders, and the Local Government may order the accused to be confined in a lunatic asylum, jail or other suitable place of safe custody, and the Magistrate or Court shall give effect to such order.
- Custody of lunatic.

467. (1) Whenever an inquiry or a trial is postponed under Section 464 or Section 465, the Magistrate or Court, as the case may be, may at any time resume the inquiry or trial, and require the accused to appear or be brought before such Magistrate or Court.
- Resumption of inquiry or trial.

- (2) When the accused has been released under Section 466, and the sureties for his appearance produce him to the officer whom the Magistrate or Court appoints in this behalf, the certificate of such officer that the accused is capable of making his defence shall be receivable in evidence.

468. (1) If, when the accused appears, or is again brought before the Magistrate or the Court, as the case may be, the Magistrate or Court considers him capable of making his defence, the inquiry or trial shall proceed.

Procedure on accused appearing before Magistrate or Court.

(2) If the Magistrate or Court considers the accused person to be still incapable of making his defence, the Magistrate or Court shall again act according to the provisions of Section 464 or Section 465, as the case may be.

469. When the accused appears to be of sound mind at the time of inquiry or trial, and the Magistrate is satisfied from the evidence given before him that there is reason to believe that the accused committed an act which, if he had been of sound mind, would have been an offence, and that he was, at the time when the act was committed, by reason of unsoundness of mind, incapable of knowing the nature of the act, or that it was wrong or contrary to law, the Magistrate shall proceed with the case, and, if the accused ought to be committed to the Court of Session or High Court, send him for trial before the Court of Session or High Court, as the case may be.

When accused appears to have been insane.

470. Whenever any person is acquitted upon the ground that, at the time at which he is alleged to have committed an offence, he was, by reason of unsoundness of mind, incapable of knowing the nature of the act alleged as constituting the offence, or that it was wrong or contrary to law, the finding shall state specifically whether he committed the act or not.

Judgment of acquittal on ground of lunacy.

471. (1) Whenever such judgment states that the accused person committed the act alleged the Magistrate or Court before whom or which the trial has been held, shall, if such act would, but for the incapacity found, have constituted an offence, order such person to be kept in safe custody in such place and manner as the Magistrate or Court thinks fit, and shall report the case for the orders of the Local Government.

Person acquitted on such ground to be kept in safe custody.

(2) The Local Government may order such person to be confined in a lunatic asylum, jail, or other suitable place of safe custody.

(3) The Governor General in Council may, by general or special order, direct that any person whom the Local Government has ordered under this Chapter to be confined in a lunatic asylum, jail or other place of safe custody, shall be removed from the place where he is confined, to any lunatic asylum, jail or other place of safe custody in British India.

Power of Governor General in Council to order criminal lunatics confined by order of Local Government to be removed from one province to another.

(4) The Local Government may empower the officer in charge of the jail in which a person is confined under the provisions of Section 466 or this Section, to discharge all or any of the functions of the Inspector General of Prisons under Section 472, Section 473, or Section 474.

Power of Local Government to relieve Inspector General of certain functions.

472. When any person is confined under the provisions of Section 466 or Section 471, the Inspector General of Prisons, if such person is confined in a jail, or the visitors of the lunatic asylum, or any two of them, if he is confined in a lunatic asylum, may visit him in order to ascertain his state of mind; and he shall be visited once at least in every six months by such Inspector General or by two of such visitors as aforesaid, and such Inspector General or visitors shall make a special report to the Local Government as to the state of mind of such person.

Lunatic prisoners to be visited by Inspector General.

473. If such person is confined under the provisions of Section 466, and Procedure where lunatic prisoner is reported capable of making his defence. such Inspector General or visitors shall certify that, in his or their opinion, such person is capable of making his defence, he shall be taken before the Magistrate or Court, as the case may be, at such time as the Magistrate or Court appoints, and the Magistrate or Court shall deal with such person under the provisions of Section 468; and the certificate of such Inspector General or visitors as aforesaid shall be receivable as evidence.

474. (1) If such person is confined under the provisions of Section 466 or Section 471, and such Inspector General or visitors shall certify that, in his or their judgment, he may be discharged without danger of his doing injury to himself or to any other person, the Local Government may thereupon order him to be discharged, or to be detained in custody, or to be transferred to a public lunatic asylum if he has not been already sent to such an asylum; and, in case it orders him to be transferred to an asylum, may appoint a Commission, consisting of a judicial and two medical officers.

(2) Such Commission shall make formal inquiry into the state of mind of such person, taking such evidence as is necessary, and shall report to the Local Government, which may order his discharge or detention as it thinks fit.

475. (1) Whenever any relative or friend of any person confined under the provisions of Section 466 or Section 471 desires that he shall be delivered over to his care and custody, the Local Government, upon the application of such relative or friend, and on his giving security to the satisfaction of such Government that the person delivered shall be properly taken care of and shall be prevented from doing injury to himself or to any other person, may order such person to be delivered to such relative or friend.

(2) Whenever such person is so delivered, it shall be upon condition that he shall be produced for the inspection of such officer and at such times as the Local Government directs.

(3) The provisions of Sections 472 and 474 shall, *mutatis mutandis*, apply to persons delivered under the provisions of this section; and the certificate of the inspecting officer appointed under this section shall be receivable as evidence.

CHAPTER XXXV.

PROCEEDINGS IN CASE OF CERTAIN OFFENCES AFFECTING THE ADMINISTRATION OF JUSTICE.

476. (1) When any Civil, Criminal or Revenue Court is of opinion that there is ground for inquiring into any offence referred to in Section 195, and committed before it or brought under its notice in the course of a judicial proceeding, such Court, after making any preliminary inquiry that may be necessary, may send the case for inquiry or trial to the nearest Magistrate of the first class and may send the accused in custody, or take sufficient security for his appearance, before such Magistrate; and may bind over any person to appear and give evidence on such inquiry or trial.

(2) Such Magistrate shall thereupon proceed according to law and as if upon complaint made and recorded under Section 200, and may, if he is authorised

under Section 192 to transfer cases, transfer the inquiry or trial to some other competent Magistrate.

477. (1) Subject to the provisions of Section 444, a Court of Sessionⁿ may charge a person for any offence referred to in Section 195 and committed before it, or brought under its notice in the course of a judicial proceeding, and may commit, or admit to bail and try, such person upon its own charge.

(2) Such Court may direct the Magistrate to cause the attendance of any witnesses for the purposes of the trial.

478. (1) When any such offence is committed before any Civil or Revenue Court, or brought under the notice of any Civil or Revenue Court in the course of a judicial proceeding, and the case is triable exclusively by the High Court or Court of Session, or such Civil or Revenue Court thinks that it ought to be tried by the High Court or Court of Session, such Civil or Revenue Court may, instead of sending the case under Section 476 to a Magistrate for inquiry, itself complete the inquiry, and commit or hold to bail the accused person to take his trial before the High Court or Court of Session, as the case may be.

(2) For the purposes of an inquiry under this section the Civil or Revenue Court may, subject to the provisions of Section 443, exercise all the powers of a Magistrate; and its proceedings in such inquiry shall be conducted as nearly as may be in accordance with the provisions of Chapter XVIII, and shall be deemed to have been held by a Magistrate.

479. When any such commitment is made by a Civil or Revenue Court, the Court shall send the charge with the order of commitment and the record of the case to the Presidency Magistrate, District Magistrate or other Magistrate authorised to commit for trial, and such Magistrate shall bring the case before the High Court or Court of Session, as the case may be, together with the witnesses for the prosecution and defence.

480. (1) When any such offence as is described in Section 175, Section 178, Section 179, Section 180 or Section 228 of the Indian Penal Code, XLV of 1860, is committed in the view or presence of any Civil, Criminal or Revenue Court, the Court may cause the offender, whether he is an European British subject or not, to be detained in custody; and at any time before the rising of the Court on the same day may, if it thinks fit, take cognizance of the offence and sentence the offender to fine not exceeding two hundred rupees, and, in default of payment to simple imprisonment for a term which may extend to one month, unless such fine be sooner paid.

(2) Nothing in Section 443 or Section 444 shall be deemed to apply to proceedings under this section.

481. (1) In every such case the Court shall record the facts constituting the offence, with the statement (if any) made by the offender, as well as the finding and sentence.

(2) If the offence is under Section 228 of the Indian Penal Code, XLV of 1860, the record shall show the nature and stage of the judicial proceeding in which the Court interrupted or insulted was sitting, and the nature of the interruption or insult.

482. (1) If the Court in any case considers that a person accused of any of the offences referred to in Section 480 and committed in its view or presence should be imprisoned otherwise than in default of payment of fine, or that a fine exceeding two hundred rupees should be imposed upon him, or such Court is for any other reason of opinion that the case should not be disposed of under Section 480, such Court, after recording the facts constituting the offence and the statement of the accused as hereinbefore provided may forward the case to a Magistrate having jurisdiction to try the same, and may require security to be given for the appearance of such accused person before such Magistrate, or, if sufficient security is not given, shall forward such person in custody to such Magistrate.

(2) The Magistrate to whom any case is forwarded under this section, shall proceed to hear the complaint against the accused person in manner hereinbefore provided.

483. When the Local Government so directs, any Registrar or any Sub-Registrar appointed under the Indian Registration Act, III of 1877, shall be deemed to be a Civil Court within the meaning of Sections 480 and 482.

484. When any Court has under Section 480 adjudged an offender to punishment for refusing or omitting to do anything which he was lawfully required to do or for any intentional insult or interruption, the Court may, in its discretion, discharge the offender or remit the punishment on his submission to the order or requisition of such Court or on apology being made to its satisfaction.

485. If any witness or person called to produce a document or thing before a Criminal Court refuses to answer such questions as are put to him or to produce any document or thing in his possession or power which the Court requires him to produce, and does not offer any reasonable excuse for such refusal, such Court may, for reasons to be recorded in writing, sentence him to simple imprisonment, or by warrant under the hand of the presiding Magistrate or Judge commit him to the custody of an officer of the Court, for any term not exceeding seven days, unless in the meantime such person consents to be examined and to answer, or to produce the document or thing. In the event of his persisting in his refusal, he may be dealt with according to the provisions of Section 480 or Section 482, and, in the case of a Court established by Royal Charter, shall be deemed guilty of a contempt.

486 (1) Any person sentenced by any Court under Section 480 or Section 485 may, notwithstanding anything hereinbefore contained, appeal to the Court to which decrees or orders made in such Court are ordinarily appealable.

(2) The provisions of Chapter XXXI shall, so far as they are applicable, apply to appeals under this section, and the Appellate Court may alter or reverse the finding, or reduce or reverse the sentence appealed against.

(3) An appeal from such conviction by a Court of Small Causes in a presidency-town shall lie to the High Court, and

an appeal from such conviction by any other Court of Small Causes shall lie to the Court of Session for the sessions division within which such Court is situate.

(4) An appeal from such conviction by any officer as Registrar or Sub-Registrar appointed as aforesaid may, when such officer is also Judge of a Civil Court, be made to the Court to which it would, under the preceding portion of this section, be made if such conviction were a decree by such officer in his capacity as such Judge, and in other cases may be made to the District Judge, or, in the presidency-towns, to the High Court.

487. (1) Except as provided in Sections 477, 480 and 485, no Judge of a Criminal Court or Magistrate, other than a Judge of a High Court and the Recorder of Rangoon, shall try any person for any offence referred to in Section 195, when such offence is committed before himself or in contempt of his authority, or is brought under his notice as such Judge or Magistrate in the course of a judicial proceeding.

(2) Nothing in Section 476 or Section 482 shall prevent a Magistrate empowered to commit to the Court of Session or High Court from himself committing any case to such Court.

CHAPTER XXXVI.

OF THE MAINTENANCE OF WIVES AND CHILDREN.

488. (1) If any person having sufficient means neglects or refuses to maintain his wife or his legitimate or illegitimate child unable to maintain itself, the District Magistrate, a Presidency Magistrate, a Subdivisional Magistrate or a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, at such monthly rate, not exceeding fifty rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate from time to time directs.

(2) Such allowance shall be payable from the date of the order, or if so ordered from the date of the application for maintenance.

(3) If any person so ordered wilfully neglects to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in manner hereinbefore provided for levying fines, and may sentence such person, for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made :

Provided that, if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing.

(4) No wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.

(5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order.

(6) All evidence under this Chapter shall be taken in the presence of the husband or father, as the case may be, or, when his personal attendance is dispensed with, in the presence of his pleader, and shall be recorded in the manner prescribed in the case of summons-cases :

Provided that, if the Magistrate is satisfied that he is wilfully avoiding service, or wilfully neglects to attend the Court, the Magistrate may proceed to hear and determine the case *ex-parte*. Any order so made may be set aside for good cause shown, on application made within three months from the date thereof.

(7) The accused may tender himself as a witness, and in such case shall be examined as such.

(8) The Court in dealing with applications under this section shall have power to make such order as to costs as may be just.

(9) The accused may be proceeded against in any district where he resides or is or where he last resided with his wife, or, as the case may be, the mother of the illegitimate child.

489. On proof of a change in the circumstances of any person receiving Alteration in allowance. under Section 488 a monthly allowance, or ordered under the same section to pay a monthly allowance to his wife or child, the Magistrate may make such alteration in the allowance as he thinks fit : Provided that, if he increases the allowance, the monthly rate of fifty rupees in the whole be not exceeded.

490. A copy of the order of maintenance shall be given without pay- Enforcement of order ment to the person in whose favour it is made, or to his guardian, if any, or to the person to whom the allow- of maintenance. ance is to be paid ; and such order may be enforced by any Magistrate in any place where the person against whom it is made may be, on such Magistrate being satisfied as to the identity of the parties and the non-payment of the allowance due.

CHAPTER XXXVII.

DIRECTIONS OF THE NATURE OF A HABEAS CORPUS.

491. (1) Any of the High Courts of Judicature Power to issue direc- at Fort William, Madras and Bombay may, whenever tions of the nature of a habeas corpus. it thinks fit, direct—

- (a) that a person within the limits of its ordinary original civil jurisdiction be brought up before the Court to be dealt with according to law ;
- (b) that a person illegally or improperly detained in public or private custody within such limits be set at liberty ;
- (c) that a prisoner detained in any jail situate within such limits be brought before the Court to be there examined as a witness in any matter pending or to be inquired into in such Court ;
- (d) that a prisoner detained as aforesaid be brought before a Court-martial or any Commissioners acting under the authority of any commission from the Governor General in Council for trial, or to be examined touching any matter pending before such Court-martial or Commissioners, respectively ;

- (e) that a prisoner within such limits be removed from one custody to another for the purpose of trial ; and
- (f) that the body of a defendant within such limits be brought in on the Sheriff's return of *cepi corpus* to a writ of attachment.
- (2) Each of the said High Courts may, from time to time, frame rules to regulate the procedure in cases under this section.
- (3) Nothing in this section applies to persons detained under the Bengal State Prisoners Regulation, III of 1818, Madras Regulation, II of 1819, or Bombay Regulation, XXV of 1827, or the State Prisoners Act, XXXIV of 1850, or the State Prisoners Act, III of 1858.

PART IX.—SUPPLEMENTARY PROVISIONS.

CHAPTER XXXVIII.

OF THE PUBLIC PROSECUTOR.

492. (1) The Governor General in Council or the Local Government may appoint, generally, or in any case, or for any specified class of cases, in any local area, one or more officers to be called Public Prosecutors.

Power to appoint Public Prosecutors.

(2) In any case committed for trial to the Court of Session, the District Magistrate, or, subject to the control of the District Magistrate, the Subdivisional Magistrate, may in the absence of the Public Prosecutor, or where no Public Prosecutor has been appointed, appoint any other person, not being an officer of police below the rank of Assistant District Superintendent, to be Public Prosecutor for the purpose of such case.

493. The Public Prosecutor may appear and plead without any written authority before any Court in which any case of which he has charge is under inquiry, trial or appeal ; and, if any private person instructs a pleader to prosecute in any Court any person in any such case, the Public Prosecutor shall conduct the prosecution, and the pleader so instructed shall act therein under his directions.

Public Prosecutor may plead in all Courts in cases under his charge. Pleaders privately instructed to be under his direction.

494. Any Public Prosecutor appointed by the Governor General in Council or the Local Government may, with the consent of the Court, in cases tried by jury before the return of the verdict, and in other cases before the judgment is pronounced, withdraw from the prosecution of any person ; and upon such withdrawal—

Effect of withdrawal from prosecution.

- (a) if it is made before a charge has been framed, the accused shall be discharged ;
- (b) if it is made after a charge has been framed, or when under this Code no charge is required, he shall be acquitted.

495. (1) Any Magistrate inquiring into or trying any case may permit the prosecution to be conducted by any person other than an officer of police below a rank to be prescribed by the Local Government in this behalf with the previous sanction of the Governor General in Council, but no person, other than the Advocate General, Standing Counsel, Government Solicitor, Public Prosecutor or other officer generally or specially empowered by the Local Government in this behalf shall be entitled to do so without such permission.

Permission to conduct prosecution.

(2) Any such officer shall have the like power of withdrawing from the prosecution as is provided by section 494, and the provisions of that section shall apply to any withdrawal by such officer.

(3) Any person conducting the prosecution may do so personally or by a pleader.

(4) An officer of police shall not be permitted to conduct the prosecution if he has taken any part in the investigation into the offence with respect to which the accused is being prosecuted.

CHAPTER XXXIX.

OF BAIL.

496. When any person other than a person accused of a non-bailable offence is arrested or detained without warrant by an officer in charge of a police-station, or appears or is brought before a Court, and is prepared at any time while in the custody of such officer or at any stage of the proceedings before such Court to give bail, such person shall be released on bail :

Provided that such officer or Court, if he or it thinks fit, may, instead of taking bail from such person, discharge him on his executing a bond without sureties for his appearance as hereinafter provided.

497. (1) When any person accused of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police-station, or appears or is brought before a Court, he may be released on bail, but he shall not be so released if there appear reasonable grounds for believing that he has been guilty of the offence of which he is accused.

(2) If it appears to such officer or Court at any stage of the investigation, inquiry or trial, as the case may be, that there are not reasonable grounds for believing that the accused has committed such offence, but that there are sufficient grounds for further inquiry into his guilt, the accused shall, pending such inquiry, be released on bail, or, at the discretion of such officer or Court, on the execution by him of a bond without sureties for his appearance as hereinafter provided.

(3) Any Court may, at any subsequent stage of any proceeding under this Code, cause any person who has been released under this section to be arrested and may commit him to custody.

498. The amount of every bond executed under this Chapter shall be fixed with due regard to the circumstances of the case, and shall not be excessive; and the High Court or Court of Session may, in any case, whether there be an appeal on conviction or not, direct that any person be admitted to bail, or that the bail required by a police-officer or Magistrate be reduced.

499. (1) Before any person is released on bail or released on his own bond, a bond for such sum of money as the police-officer or Court, as the case may be, thinks sufficient shall be executed by such person, and, when he is released on bail, by one or more sufficient sureties conditioned that such person shall attend at the time and place mentioned in the bond, and shall continue so to attend until otherwise directed by the police-officer or Court, as the case may be.

(2) If the case so require, the bond shall also bind the person released on bail to appear when called upon at the High Court, Court of Session or other Court to answer the charge.

500. (1) As soon as the bond has been executed, the person for whose appearance it has been executed shall be released; and, when he is in jail, the Court admitting him to bail shall issue an order of release to the officer in charge of the jail, and such officer on receipt of the order shall release him.

(2) Nothing in this section, section 496 or section 497, shall be deemed to require the release of any person liable to be detained for some matter other than that in respect of which the bond was executed.

501. If through mistake, fraud or otherwise, insufficient sureties have been accepted, or if they afterwards become insufficient, the Court may issue a warrant of arrest directing that the person released on bail be brought before it and may order him to find sufficient sureties, and, on his failing so to do, may commit him to jail.

502. (1) All or any sureties for the attendance and appearance of a person released on bail may at any time apply to a Magistrate to discharge the bond, either wholly or so far as relates to the applicants.

(2) On such application being made, the Magistrate shall issue his warrant of arrest directing that the person so released be brought before him.

(3) On the appearance of such person pursuant to the warrant, or on his voluntary surrender, the Magistrate shall direct the bond to be discharged either wholly or so far as relates to the applicant, and shall call upon such person to find other sufficient sureties, and, if he fails to do so, may commit him to custody.

CHAPTER XL.

OF COMMISSIONS FOR THE EXAMINATION OF WITNESSES.

503. (1) Whenever, in the course of an enquiry, a trial or any other proceeding under this Code; it appears to a Presidency Magistrate, a District Magistrate, a Court of Session or the High Court that the examination of a witness is necessary for the ends of justice, and that the attendance of such witness cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable, such Magistrate or Court may dispense with such attendance, and may issue a commission to any District Magistrate or Magistrate of the first class, within the local limits of whose jurisdiction such witness resides, to take the evidence of such witness.

(2) When the witness resides in the territories of any Prince or Chief in India in which there is an officer representing the British Indian Government the commission may be issued to such officer.

(3) The Magistrate or officer to whom the commission is issued, or, if he is the District Magistrate, he or such Magistrate of the first class as he appoints in this behalf, shall proceed to the place where the witness is or shall summon the witness before him, and shall take down his evidence in the same manner, and may for this purpose exercise the same powers as in trials of warrant-cases under this Code.

(4) Where the commission is issued to such officer as is mentioned in subsection (2), he may delegate his powers and duties under the commission to any officer subordinate to him whose powers are not less than those of a Magistrate of the first class in British India.

504. (1) If the witness is within the local limits of the jurisdiction of any Presidency Magistrate, the Magistrate or Court issuing the commission may direct the same to the said Presidency Magistrate, who thereupon may compel the attendance of, and examine, such witness as if he were a witness in a case pending before himself.

(2) Nothing in this section shall be deemed to affect the power of the High Court to issue commissions under the Slave Trade Act, 1876, section 3 (39 & 40 Vic., c. 46).

505. The parties to any proceeding under this Code in which a commission is issued may respectively forward any interrogatories in writing which the Magistrate or Court directing the commission may think relevant to the issue, and the Magistrate or officer to whom the commission is directed shall examine the witness upon such interrogatories.

(2) Any such party may appear before such Magistrate or officer by pleader, or, if not in custody, in person, and may examine, cross-examine and re-examine (as the case may be) the said witness.

506. Whenever, in the course of an inquiry or a trial or any other proceeding under this Code before any Magistrate other than a Presidency Magistrate or District Magistrate, it appears that a commission ought to be issued for the examination of a witness whose evidence is necessary for the ends of justice, and that the attendance of such witness cannot be procured without an amount of delay, expense or inconvenience which under the circumstances of the case would be unreasonable, such Magistrate shall apply to the District Magistrate, stating the reasons for the application, and the District Magistrate may either issue a commission in the manner hereinbefore provided or reject the application.

507. (1) After any commission issued under section 503 or section 506 has been duly executed, it shall be returned, together with the deposition of the witness examined thereunder, to the Court out of which it issued; and the commission, the return thereto and the deposition shall be open at all reasonable times to inspection of the parties, and may, subject to all just exceptions, be read in evidence in the case by either party, and shall form part of the record.

(2) Any deposition so taken, if it satisfies the conditions prescribed by section 33 of the Indian Evidence Act, I of 1872, may also be received in evidence at any subsequent stage of the case before another Court.

508. In every case in which a commission is issued under section 503, or section 506, the inquiry, trial or other proceeding may be adjourned for a specified time reasonably sufficient for the execution and return of the commission.

CHAPTER XLI.

SPECIAL RULES OF EVIDENCE.

509. (1) The deposition of a Civil Surgeon or other medical witness taken and attested by a Magistrate in the presence of the accused, or taken on commission under Chapter XL, may be given in evidence in any inquiry, trial or

other proceeding under this Code, although the deponent is not called as a witness.

Power to summon medical witness.

(2) The Court may, if it thinks fit, summon and examine such deponent as to the subject-matter of his deposition.

510. Any document purporting to be a report under the hand of any Chemical Examiner or Assistant Chemical Examiner to Government, upon any matter or thing duly submitted to him for examination or analysis and report in the course of any proceeding under this Code, may be used as evidence in any inquiry, trial or other proceeding under this Code.

511. In any inquiry, trial or other proceeding under this Code, a previous conviction or acquittal may be proved, in addition to any other mode provided by any law for the time being in force,—

(a) by an extract certified under the hand of the officer having the custody of the records of the Court in which such conviction or acquittal was had to be a copy of the sentence or order: or

(b) in case of a conviction, either by a certificate signed by the officer in charge of the jail in which the punishment or any part thereon was inflicted, or by production of the warrant of commitment under which the punishment was suffered;

together with, in each of such cases, evidence as to the identity of the accused person with the person so convicted or acquitted.

512. (1) if it is proved that an accused person has absconded, and that there is no immediate prospect of arresting him, the Court competent to try or commit for trial such person for the offence complained of may, in his absence, examine the witnesses (if any) produced on behalf of the prosecution, and record their depositions. Any such deposition may, on the arrest of such person, be given in evidence against him on the inquiry into, or trial for, the offence with which he is charged, if the deponent is dead or incapable of giving evidence or his attendance cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable.

(2) If it appears that an offence punishable with death or transportation has been committed by some person or persons unknown, the High Court may direct that any Magistrate of the first class shall hold an inquiry and examine any witnesses who can give evidence concerning the offence. Any depositions so taken may be given in evidence against any person who is subsequently accused of the offence, if the deponent is dead or incapable of giving evidence, or beyond the limits of British India.

CHAPTER XLII.

PROVISIONS AS TO BONDS.

513. When any person is required by any Court or officer to execute a bond with or without sureties, such Court or officer may, except in the case of a bond for good behaviour, permit him to deposit a sum of money or Government promissory notes to such amount as the Court or officer may fix, in lieu of executing such bond.

Deposit instead of recognizance.

514. (1) Whenever it is proved to the satisfaction of the Court by which a bond under this Code has been taken, or of the Court of a Presidency Magistrate or Magistrate of the first class,
Procedure on forfeiture of bond.

or, when the bond is for appearance before a Court, to the satisfaction of such Court,

that such bond has been forfeited, the Court shall record the grounds of such proof, and may call upon any person bound by such bond to pay the penalty thereof, or to show cause why it should not be paid.

(2) If sufficient cause is not shown and the penalty is not paid, the Court may proceed to recover the same by issuing a warrant for the attachment and sale of the moveable property belonging to such person or his estate if he be dead.

(3) Such warrant may be executed within the local limits of the jurisdiction of the Court which issued it; and it shall authorise the distress and sale of any moveable property belonging to such person without such limits, when endorsed by the District Magistrate or Chief Presidency Magistrate within the local limits of whose jurisdiction such property is found.

(4) If such penalty is not paid and cannot be recovered by such attachment and sale, the person so bound shall be liable, by order of the Court which issued the warrant, to imprisonment in the civil jail for a term which may extend to six months.

(5) The Court may, at its discretion, remit any portion of the penalty mentioned and enforce payment in part only.

(6) Where a surety to a bond dies before the bond is forfeited, his estate shall be discharged from all liability in respect of the bond, but the party who gave the bond may be required to find a new surety.

515. All orders passed under section 514 by any Magistrate other than a Presidency Magistrate or District Magistrate shall be
Appeal from, and revision of, orders under section 514. appealable to the District Magistrate, or, if not so appealed, may be revised by him.

516. The High Court or Court of Session may
Power to direct levy of amount due on certain recognizance. direct any Magistrate to levy the amount due on a bond to appear and attend at such High Court or Court of Session.

CHAPTER XLIII.

OF THE DISPOSAL OF PROPERTY.

517. (1) When an inquiry or trial in any Criminal Court is concluded,
Order for disposal of property regarding which offence committed. the Court may make such order as it thinks fit for the disposal of any property or document produced before it or in its custody or regarding which any offence appears to have been committed, or which has been used for the commission of any offence.

(2) When a High Court or a Court of Session makes such order and cannot through its own officers conveniently deliver the property to the person entitled thereto, such Court may direct that the order be carried into effect by the District Magistrate.

(3) When an order is made under this section in a case in which an appeal lies, such order shall not (except when the property is live-stock or subject to speedy and natural decay) be carried out until the period allowed for presenting such appeal has passed, or, when such appeal is presented within such period, until such appeal has been disposed of.

Explanation.—In this section the term “property” includes, in the case of property regarding which an offence appears to have been committed, not only such property as has been originally in the possession or under the control of any party, but also any property into or for which the same may have been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise.

518. In lieu of itself passing an order under section 517, the Court may Order may take form of direct the property to be delivered to the District reference to District or Magistrate or to a Subdivisional Magistrate, who shall Subdivisional Magistrate. in such cases deal with it as if it had been seized by the police and the seizure had been reported to him in the manner hereinafter mentioned.

519. When any person is convicted of any offence which includes, or Payment to innocent purchaser of money found on accused. amounts to, theft or receiving stolen property, and it is proved that any other person has bought the stolen property from him without knowing, or having reason to believe, that the same was stolen, and that any money has on his arrest been taken out of the possession of the convicted person, the Court may, on the application of such purchaser, and on the restitution of the stolen property to the person entitled to the possession thereof, order that out of such money a sum not exceeding the price paid by such purchaser be delivered to him.

520. Any Court of appeal, confirmation, reference or revision may direct Stay of order under sections 517, 518 or 519. any order under section 517, section 518 or section 519, passed by a Court subordinate thereto, to be stayed pending consideration by the former Court, and may modify, alter or annul such order and make any further orders that may be just.

521. (1) On a conviction under the Indian Penal Code, XLV of 1860, Destruction of libellous and other matter. section 292, section 293, section 501 or section 502, the Court may order the destruction of all the copies of the thing in respect of which the conviction was had, and which are in the custody of the Court or remain in the possession or power of the person convicted.

(2) The Court may, in like manner, on a conviction under the Indian Penal Code, XLV of 1860, section 272, section 273, section 274 or section 275, order the food, drink, drug or medical preparation, in respect of which the conviction was had, to be destroyed.

522. (1) Whenever a person is convicted of an offence attended by criminal force and it appears to the Court that by such force any person has been dispossessed of any immovable property, the Court may, if it thinks fit, order such person to be restored to the possession of the same Power to restore possession of immovable property.

(2) No such order shall prejudice any right or interest to or in such immovable property which any person may be able to establish in a civil suit.

523. (1) The seizure by any police officer of property taken under section 51, or alleged or suspected to have been stolen, or found under circumstances which create suspicion of the commission of any offence, shall be forthwith reported to a Magistrate, who shall make such order as he thinks fit respecting the disposal of such property or the delivery of such to the person entitled to the possession thereof, or, if such person cannot be ascertained, respecting the custody and production of such property.

(2) If the person so entitled is known, the Magistrate may order the property to be delivered to him on such conditions (if any) as the Magistrate thinks fit. If such person is unknown, the Magistrate may detain it and shall, in such a case, issue a proclamation specifying the articles of which such property consists, and requiring any person who may have a claim thereto, to appear before him and establish his claim within six months from the date of such proclamation.

524. (1) If no person within such period establishes his claim to such property, and if the person in whose possession such claimant appears within six months. property was found is unable to show that it was legally acquired by him, such property shall be at the disposal of the Government, and may be sold under the orders of the Presidency Magistrate, District Magistrate or Subdivisional Magistrate, or of a Magistrate of the first class empowered by the Local Government in this behalf

(2) In the case of every order passed under this section, an appeal shall lie to the Court to which appeals against sentences of the Court passing such order would lie.

525. If the person entitled to the possession of such property is unknown or absent and the property is subject to speedy and natural decay, or the Magistrate to whom its seizure is reported is of opinion that its sale would be for the benefit of the owner, the Magistrate may at any time direct it to be sold; and the provisions of sections 523 and 524 shall, as nearly as may be practicable, apply to the nett proceeds of such sale.

CHAPTER XLIV.

OF THE TRANSFER OF CRIMINAL CASES.

526. (1) Whenever it is made to appear to the High Court—
High Court may transfer case or itself try it.

- (a) that a fair and impartial enquiry or trial cannot be had in any Criminal Court subordinate thereto, or
- (b) that some question of law of unusual difficulty is likely to arise, or
- (c) that a view of the place in or near which any offence has been committed may be required for the satisfactory inquiry into or trial of the same, or
- (d) that an order under this section will tend to the general convenience of the parties or witnesses, or
- (e) that such an order is expedient for the ends of justice, or is required by any provision of this Code,

it may order—

(i) that any offence be inquired into or tried by any Court not empowered under sections 177 to 184 (both inclusive), but in other respects competent to inquire into or try such offence ;

(ii) that any particular criminal case or appeal, or class of such cases or appeals, be transferred from a Criminal Court subordinate to its authority to any other such Criminal Court of equal or superior jurisdiction ;

(iii) that any particular criminal case or appeal be transferred to and tried before itself ; or

(iv) that an accused person be committed for trial to itself or to a Court of Session.

(2) When the High Court withdraws for trial before itself any case from any Court other than the Court of a Presidency Magistrate, it shall, except as provided in section 267, observe in such trial the same procedure which that Court would have observed if the case had not been so withdrawn.

(3) The High Court may act either on the report of the lower Court, or on the application of a party interested, or on its own initiative.

(4) Every application for the exercise of the power conferred by this section shall be made by motion, which shall, except when the applicant is the Advocate-General, be supported by affidavit or affirmation.

(5) When an accused person makes an application under this section, the High Court may direct him to execute a bond, with or without sureties, conditioned that he will, if convicted, pay the costs of the prosecutor.

(6) Every accused person making any such application shall give to the Notice to Public Prosecutor of application together with a copy of the grounds on which it is made ; and no order shall be made on the merits of the application unless at least twenty-four hours have elapsed between the giving of such notice and the hearing of the application.

(7) Nothing in this section shall be deemed to affect any order made under section 197.

(8) If, in any criminal case or appeal, before the commencement of the hearing the Public Prosecutor, the complainant or the accused notifies to the Court before which the case or appeal is pending his intention to make an application under this section in respect of the case, the Court shall exercise the powers of postponement or adjournment given by section 344 in such a manner as will afford a reasonable time for the application being made and an order being obtained thereon, before the accused is called on for his defence, or in the case of an appeal, before the hearing of the appeal.

527. (1) The Governor-General in Council may, by notification in the Gazette of India, direct the transfer of any particular criminal case or appeal from one High Court to another High Court, or from any Criminal Court subordinate to one High Court to any other Criminal Court of equal or superior jurisdiction subordinate to another High Court, whenever it appears to him that such transfer will promote the ends of justice, or tend to the general convenience of parties or witnesses.

The Court to which such case or appeal is transferred shall deal with the same as if it had been originally instituted in, or presented to, such Court.

528. (1) Any Chief Presidency Magistrate, District Magistrate, or Subdivisional Magistrate may withdraw any case from, or recall any case which he has made over to, any Magistrate subordinate to him, and may inquire into or try such case himself, or refer it for inquiry or trial to any other such Magistrate competent to inquire into or try the same.

(2) The Local Government may authorise the District Magistrate to withdraw from any Magistrate subordinate to him either such classes of cases as he thinks proper, or particular classes of cases.

(3) A Magistrate making an order under this section shall record in writing his reasons for making the same.

(4) The head of a village under Madras Regulation IV of 1821 is a Magistrate for the purposes of this section.

CHAPTER XLV.

OF IRREGULAR PROCEEDINGS.

529. If any Magistrate not empowered by law to do any of the following things, namely :—

Irregularities which do not vitiate proceedings.

- (a) to issue a search-warrant under Section 98 ;
- (b) to order, under Section 155, the police to investigate an offence ;
- (c) to hold an inquest under Section 176 ;
- (d) to issue process, under Section 186, for the apprehension of a person within the local limits of his jurisdiction who has committed an offence outside such limits ;
- (e) to take cognizance of an offence under Section 190, sub-section (1), clause (a) or clause (b) ;
- (f) to transfer a case under Section 192 ;
- (g) to tender a pardon under Section 337 or Section 338 ;
- (h) to sell property under Section 524 or Section 525 ; or
- (i) to withdraw a case and try it himself under Section 528 ;

erroneously in good faith does that thing, his proceedings shall not be set aside merely on the ground of his not being so empowered.

530. If any Magistrate, not being empowered by law in this behalf, does any of the following things, namely :—

Irregularities which vitiate proceedings.

- (a) attaches and sells property under Section 88 ;
- (b) issues a search-warrant for a letter, parcel or other thing in the Post Office, or a telegram in the Telegraph Department ;
- (c) demands security to keep the peace ;
- (d) demands security for good behaviour ;
- (e) discharges a person lawfully bound to be of good behaviour ;
- (f) cancels a bond to keep the peace ;

- (g) makes an order under Section 133, as to a local nuisance ;
- (h) prohibits, under Section 143, the repetition or continuance of a public nuisance ;
- (i) issues an order under Section 144 ;
- (j) makes an order under Chapter XII ;
- (k) takes cognizance, under Section 190, sub-section (1), clause (c), of an offence ;
- (l) passes a sentence, under Section 349, on proceedings recorded by another Magistrate ;
- (m) calls, under Section 435, for proceedings ;
- (n) makes an order for maintenance ;
- (o) revises, under Section 515, an order passed under Section 514 ;
- (p) tries an offender ;
- (q) tries an offender summarily ; or
- (r) decides an appeal ;

his proceedings shall be void.

531. No finding, sentence or order of any Criminal Court shall be set aside merely on the ground that the inquiry, trial or other proceeding in the course of which it was arrived at or passed, took place in a wrong sessions division, district, subdivision or other local area, unless it appears that such error has in fact occasioned a failure of justice.

532. (1) If any Magistrate or other authority purporting to exercise powers duly conferred, which were not so conferred, commits an accused person for trial before a Court of Session or High Court, the Court to which the commitment is made may, after perusal of the proceedings, accept the commitment if it considers that the accused has not been injured thereby, unless, during the inquiry and before the order of commitment, objection was made on behalf either of the accused or of the prosecution to the jurisdiction of such Magistrate or other authority.

(2) If such Court considers that the accused was injured, or if such objection was so made, it shall quash the commitment and direct a fresh inquiry by a competent Magistrate.

533. (1) If any Court, before which a confession or other statement of an accused person recorded or purporting to be recorded under Section 164 or Section 364 is tendered or has been received in evidence, finds that any of the provisions of either of such sections have not been complied with by the Magistrate recording the statement, it shall take evidence that such person duly made the statement recorded ; and, notwithstanding anything contained in the Indian Evidence Act, of 1872, Section 91, such statement shall be admitted, if the error has not injured the accused as to his defence on the merits.

(2) The provisions of this section apply to Courts of Appeal, Reference and Revision.

534. An omission to ask any person whether he is an European British subject, in a case to which sub-section (2) of Section 454 applies, shall not affect the validity of any proceeding.

535. (1) No finding or sentence pronounced or passed shall be deemed invalid merely on the ground that no charge was framed unless, in the opinion of the Court of Appeal or Revision, a failure of justice has in fact been occasioned thereby.

Effect of omission to prepare charge.

(2) If the Court of Appeal or Revision thinks that a failure of justice has been occasioned by an omission to frame a charge, it shall order that a charge be framed, and that the trial be recommenced from the point immediately after the framing of the charge.

536. (1) If an offence triable with the aid of assessors is tried by a jury, the trial shall not on that ground only be invalid.

Trial by jury of offence triable with assessors.

(2) If an offence triable by a jury is tried with the aid of assessors, the trial shall not on that ground only be invalid, unless the objection is taken before the Court records its finding.

Trial with assessors of offence triable by jury.

537. Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered under Chapter XXVII or on appeal or revision on account—

Finding or sentence when reversible by reason of error or omission in charge of other proceedings.

(a) of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or

(b) of the want of or any irregularity in any sanction required by Section 195, or any irregularity in proceedings taken under Section 476, or

(c) of the omission to revise any list of jurors or assessors in accordance with Section 324, or

(d) of any misdirection in any charge to a jury unless such error, omission, irregularity, want or misdirection has in fact occasioned a failure of justice.

Explanation.—In determining whether any error, omission or irregularity in any proceeding under this Code has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings.

Illustration.

A Magistrate being required by law to sign a document signs it by initials only. This is purely an irregularity and does not affect the validity of the proceeding.

538. No distress made under this Code shall be deemed unlawful, nor shall any person making the same be deemed a trespasser, on account of any defect or want of form in the summons, conviction, writ of distress or other proceedings relating thereto.

Distress not illegal nor distrainer a trespasser for defect or want of form in proceedings.

CHAPTER XLVI.

MISCELLANEOUS.

539. Affidavits and affirmations to be used before any High Court or any Courts and persons before whom affidavits may be sworn. officer of such Court may be sworn and affirmed before such Court or the Clerk of the Crown, or any Commissioner or other person appointed by such Court for

that purpose, or any Judge, or any Commissioner for taking affidavits in any Court of Record in British India, or any Commissioner to administer oaths in England or Ireland, or any Magistrate authorised to take affidavits or affirmations in Scotland.

540. Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case.

541. (1) Unless when otherwise provided by any law for the time being in force, the Local Government may direct in what place any person liable to be imprisoned or committed to custody under this Code shall be confined.

(2) If any person liable to be imprisoned or committed to custody under this Code is in confinement in a civil jail, the Court or Magistrate ordering the imprisonment or committal may direct that the person be removed to a criminal jail.

(3) When a person is removed to a criminal jail under sub-section (1), he shall, on being released therefrom, be sent back to the civil jail, unless either—

(a) three years have elapsed since he was removed to the criminal jail in which case he shall be deemed to have been discharged from the civil jail under Section 342 of the Code of Civil Procedure, XIV of 1882; or

(b) the Court which ordered his imprisonment in the civil jail has certified to the officer in charge of the criminal jail that he is entitled to be discharged under Section 341 of the Code of Civil Procedure, XIV of 1882.

542. (1) Notwithstanding anything contained in the Prisoners' Testimony Act, XV of 1869, any Presidency Magistrate desirous of examining, as a witness or an accused person, in any case pending before him, any person confined in any jail within the local limits of his jurisdiction, may issue an order to the officer in charge of the said jail requiring him to bring such prisoner in proper custody, at a time to be therein named, to the Magistrate for examination.

(2) The officer so in charge, on receipt of such order, shall act in accordance therewith, and shall provide for the safe custody of the prisoner during his absence from the jail for the purpose aforesaid.

543. When the services of an interpreter are required by any Criminal Court for the interpretation of any evidence or statement, he shall be bound to state the true interpretation of such evidence or statement.

544. Subject to any rules made by the Local Government with the previous sanction of the Governor-General in Council, any Criminal Court may, if it thinks fit, order payment, on the part of Government, of the reasonable expenses of complainants and witnesses.

expenses of any complainant or witness attending for the purposes of any inquiry, trial or other proceeding before such Court under this Code.

545. (1) Whenever under any law in force for the time being a Criminal Court imposes a fine or confirms in appeal, revision or otherwise a sentence of fine, or a sentence of which fine forms a part, the Court may, when passing judgment, order the whole or any part of the fine recovered to be applied—

(a) in defraying expenses properly incurred in the prosecution ;

(b) in compensation for the injury caused by the offence committed, where substantial compensation is, in the opinion of the Court, recoverable by civil suit.

(2) If the fine is imposed in a case which is subject to appeal, no such payment shall be made before the period allowed for presenting the appeal has elapsed, or, if an appeal be presented, before the decision of the appeal.

546. At the time of awarding compensation in any subsequent civil suit relating to the same matter, the Court shall take into account any sum paid or recovered as compensation under Section 545.

547. Any money (other than a fine) payable by virtue of any order made under this Code shall be recoverable as if it were a fine.

548. If any person affected by a judgment or order passed by a Criminal Court desires to have a copy of the Judge's charge to the jury or of any order or deposition or other part of the record, he shall, on applying for such copy, be furnished therewith :

Provided that he pays for the same, unless the Court, for some special reason, thinks fit to furnish it free of cost.

549. (1) The Governor-General in Council may make rules, consistent with this Code and the Army Act (44 and 45 Vict., c. 58) or any similar law for the time being in force, as to the cases in which persons subject to military law shall be tried by a Court to which this Code applies, or by Court-martial ; and when any person is brought before a Magistrate and charged with an offence for which he is liable, under the Army Act, Section 41 (44 and 45 Vict., c. 58), to be tried by a Court-martial, such Magistrate shall have regard to such rules and shall in proper cases deliver him, together with a statement of the offence of which he is accused, to the commanding officer of the regiment, corps or detachment to which he belongs, or to the commanding officer of the nearest military station for the purpose of being tried by Court-martial.

(2) Every Magistrate shall, on receiving a written application for that purpose by the commanding officer of any body of troops stationed or employed at any such place, use his utmost endeavours to apprehend and secure any person accused of such offence.

550. Any police-officer may seize any property which may be alleged or suspected to have been stolen, or which may be found under circumstances which create suspicion of the commission of any offence. Such police-officer, if subordinate to the officer in charge of a police-station, shall forthwith report the seizure to that officer.

551. Police-officers superior in rank to an officer in charge of a police-station may exercise the same powers, throughout the local area to which they are appointed, as may be exercised by such officer within the limits of his station.

552. Upon complaint made to a Presidency Magistrate or District Magistrate on oath of the abduction or unlawful detention of a woman or of a female child under the age of fourteen years, for any unlawful purpose, he may make an order for the immediate restoration of such woman to her liberty, or of such female child to her husband, parent, guardian or other person having the lawful charge of such child, and may compel compliance with such order, using such force as may be necessary.

553. (1) Whenever any person causes a police-officer to arrest another person in a presidency-town, if it appears to the Magistrate by whom the case is heard that there was no sufficient ground for causing such arrest, the Magistrate may award such compensation, not exceeding fifty rupees, to be paid by the person so causing the arrest to the person so arrested, for his loss of time and expenses in the matter, as the Magistrate thinks fit.

(2) In such cases, if more persons than one are arrested, the Magistrate may, in like manner, award to each of them such compensation, not exceeding fifty rupees, as such Magistrate thinks fit.

(3) All compensation awarded under this section may be recovered as if it were a fine, and, if it cannot be so recovered, the person by whom it is payable shall be sentenced to simple imprisonment for such term not exceeding thirty days as the Magistrate directs, unless such sum is sooner paid.

554. (1) With the previous sanction of the Governor-General in Council, the High Court at Fort William, and, with the previous sanction of the Local Government, any other High Court established by Royal Charter, may, from time to time, make rules for the inspection of the records of subordinate Courts.

Power of other High Courts to make rules for other purposes. (2) Every High Court not established by Royal Charter may, from time to time, and with the previous sanction of the Local Government,—

- (a) make rules for keeping all books, entries and accounts to be kept in all Criminal Courts subordinate to it, and for the preparation and transmission of any returns or statements to be prepared and submitted by such Courts;
- (b) frame forms for every proceeding in the said Courts for which it thinks that a form should be provided;
- (c) make rules for regulating its own practice and proceedings and the practice and proceedings of all Criminal Courts subordinate to it; and
- (d) make rules for regulating the execution of warrants issued under this Code for the levy of fines:

Provided that the rules and forms made and framed under this section shall not be inconsistent with this Code or any other law in force for the time being.

(3) All rules made under this section shall be published in the local official Gazette.

555. Subject to the power conferred by Section 553, and by Section 15 of the Indian High Courts Act, 1861 (24 and 25 Vict., c. 104), the forms set forth in the fifth schedule, with such variation as the circumstances of each case require, may be used for the respective purposes therein mentioned, and if used shall be sufficient.

556. No Judge or Magistrate shall, except with the permission of the Court to which an appeal lies from his Court, try or commit for trial any case to or in which he is a party, or personally interested, and no Judge or Magistrate shall hear an appeal from any judgment or order passed or made by himself.

Explanation.—A Judge or Magistrate shall not be deemed to be a party or personally interested, within the meaning of this section, to or in any case by reason only that he is a Municipal Commissioner or otherwise concerned therein in a public capacity, or by reason only that he has viewed the place in which an offence is alleged to have been committed, or any other place in which any other transaction material to the case is alleged to have occurred, and made an inquiry in connection with the case.

Illustration.

A as Collector, upon consideration of information furnished to him, directs the prosecution of B for a breach of the Excise Laws. A is disqualified from trying this case as a Magistrate.

557. No pleader who practises in the Court of any Magistrate in a presidency-town or district, shall sit as a Magistrate in such Court or in any Court within the jurisdiction of such Court.

558. The Local Government may determine what, for the purposes of this Code, shall be deemed to be the language of each Court within the territories administered by such Government, other than the High Courts established by Royal Charter.

Powers of Governor-General in Council and Local Government exerciseable from time to time.

559. All powers conferred by this Code on the Governor-General in Council or on the Local Government may be exercised from time to time as occasion requires.

Officers concerned in sales not to purchase or bid for property.

560. A public servant having any duty to perform in connection with the sale of any property under this Code shall not purchase or bid for the property.

Special provisions with respect to offence of rape by a husband.

561. (1) Notwithstanding anything in this Code, no Magistrate, except a Chief Presidency Magistrate or District Magistrate, shall—

(a) take cognizance of the offence of rape where the sexual intercourse was by a man with his wife; or

(b) commit the man for trial for the offence :

(2) And, notwithstanding anything in this Code, if a Chief Presidency Magistrate or District Magistrate deems it necessary to direct an investigation by a police-officer with respect to such an offence as is referred to in sub-section (1), no police-officer of a rank below that of police-inspector shall be employed, either to make, or to take part in, the investigation.

First Offenders.

562. In any case in which a person is convicted of theft, theft in a building, dishonest misappropriation, cheating, or any other offence under the Indian Penal Code, XLV of 1860, punishable with not more than two years' imprisonment before any Court, and no previous conviction is proved against him, if it appears to the Court before whom he is so convicted, that, regard being had to the youth, character and antecedents of the offender, to the trivial nature of the offence and to any extenuating circumstances under which the offence was committed, it is expedient that the offender be released on probation of good conduct, the Court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond, with or without sureties, and during such period (not exceeding one year) as the Court may direct, to appear and receive sentence when called upon, and in the meantime to keep the peace and be of good behaviour :

Provided that, where any first offender is convicted by a Magistrate of the third class, or a Magistrate of the second class not specially empowered by the Local Government in this behalf, and the Magistrate is of opinion that the powers conferred by this section should be exercised, he shall record his opinion to that effect and submit the proceedings to a Magistrate of the first class or Subdivisional Magistrate, forwarding the accused to, or taking bail for his appearance before, such Magistrate, who shall dispose of the case in manner provided by Section 380.

563. (1) If the Court which convicted the offender, or a Court which could have dealt with the offender in respect of his original offence, is satisfied that the offender has failed to observe any of the conditions of his recognizance, it may issue a warrant for his apprehension.

(2) An offender, when apprehended on any such warrant, shall be brought forthwith before the Court issuing the warrant, and such Court may either remand him in custody until the case is heard or admit him to bail with a sufficient surety conditioned on his appearing for sentence. Such Court may, after hearing the case, pass sentence.

564. (1) The Court, before directing the release of an offender under Section 562, shall be satisfied that the offender or his surety (if any) has a fixed place of abode or regular occupation in the place for which the Court acts or in which the offender is likely to live during the period named for the observance of the conditions.

(2) Nothing in this Section or in sections 562 and 563 shall affect the provisions of Section 31 of the Reformatory Schools Act, VIII of 1897.

Previously convicted Offenders.

565. (1) When any person, having been convicted of any offence punishable under Chapter XII or Chapter XVII of the Indian Penal Code, XLV of 1860, with imprisonment for a term of three years or upwards, is again convicted of any offence punishable under either of those Chapters with imprisonment for a term of three years or upwards by a High Court, Court of Session, Presidency Magistrate, District Magistrate, Subdivisional Magistrate, or any Magistrate of the first class specially empowered by the

Local Government in this behalf, such Court or Magistrate may, if it or he thinks fit, at the time of passing sentence of transportation or imprisonment on such person, also order that his residence and any change of residence after release be notified, as hereinafter provided, for a term not exceeding five years from the date of the expiration of such sentence.

(2) If such conviction is set aside on appeal or otherwise, such order shall become void.

(3) The Local Government, with the previous sanction of the Governor-General in Council, may make rules to carry out the provisions of this section relating to the notification of residence by released convicts.

(4) Any person refusing or neglecting to comply with any rule so made shall be punishable as if he had committed an offence under Section 176 of the Indian Penal Code.

SCHEDULE I.

ENACTMENTS REPEALED.

(See Section 2).

Year.	No.	Short title or subject.	Extent of repeal.
1875	X	High Courts' Criminal Procedure ...	The whole.
1882	X	The Code of Criminal Procedure, 1882	The whole.
1884	III	The Criminal Procedure Code Amendment Act, 1884.	The whole.
1886	X	Amending the Code of Criminal Procedure, 1882, and certain other Acts.	Sections 1 to 10 (both inclusive).
1887	V	Amending the Code of Criminal Procedure, 1882.	The whole.
"	XIV	The Indian Marine Act, 1887 ...	Section 78.
1889	I	The Metal Tokens Act, 1889 ...	Section 7.
"	V	Abolishing the office of Coroner of Madras.	Section 4, sub-section (1).
"	XI	The Lower Burma Courts Act, 1889 ...	So much of the second schedule as relates to the Code of Criminal Procedure, 1882.
"	XIII	The Cantonments Act, 1889 ...	So much of the schedule as relates to the Code of Criminal Procedure, 1882.
1891	III	Amending the Indian Evidence Act, 1872, and the Code of Criminal Procedure, 1882.	Section 9.
"	IV	Amending the Code of Criminal Procedure, 1882.	The whole.
"	X	Amending the Indian Penal Code and the Code of Criminal Procedure, 1882.	Sections 2 and 3.
"	XII	The Repealing and Amending Act, 1891.	So much as relates to the Code of Criminal Procedure, 1882.
1894	III	Amending the Code of Criminal Procedure, 1882, and the Indian Penal Code.	Sections 1 to 4 (both inclusive).
"	X	Amending the Code of Criminal Procedure, 1882.	The whole.
1896	IV	Amending Sections 366 and 371 of the Code of Criminal Procedure, 1882.	The whole.
1896	XIII	Amending the Code of Criminal Procedure, 1882.	The whole.

SCHEDULE II.

TABULAR STATEMENT OF OFFENCES.

EXPLANATORY NOTE.—The entries in the second and seventh columns of this schedule, headed respectively "Offence" and "Punishment under the Indian Penal Code," are not intended as definitions of the offences and punishments described in the several corresponding sections of the Indian Penal Code, or even as abstracts of those sections, but merely as references to the subject of the section, the number of which is given in the first column. The third column of this schedule applies also to the police in the towns of Calcutta and Bombay.

CHAPTER V.—ABETMENT.

1	2	3	4	5	6	7	8
Section	(Offence.	Whether the police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether the offence is bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
109	Abetment of any offence, if the act abetted is committed in consequence, and where no express provision is made for its punishment.	May arrest without warrant if arrest for the offence abetted may be made without warrant, but not otherwise.	According as a warrant or summons may issue for the offence abetted.	According as the offence abetted is bailable or not.	According as the offence is compoundable or not.	The same punishment as for the offence abetted.	The Court by which the offence abetted is triable.
110	Abetment of any offence, of the person abetted does the act with a different intention from that of the abettor.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto.
111	Abetment of any offence, when one act is abetted and a different act is done; subject to the proviso.	Ditto	Ditto	Ditto	Ditto	The same punishment as for the offence intended to be abetted.	Ditto.
112	Abetment of any offence, when an effect is caused by the act abetted different from that intended by the abettor.	Ditto	Ditto	Ditto	Ditto	The same punishment as for the offence committed.	Ditto.
113	Abetment of any offence, if abettor is present when offence is committed.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto.

115	Abetment of an offence, punishable with death or transportation for life, if the offence be not committed in consequence of the abetment.	Ditto	...	Ditto	...	Not bailable...	Ditto	...	Imprisonment of either description for 7 years and fine.	Ditto.
	If an act which causes harm be done in consequence of the abetment.	Ditto	...	Ditto	...	Ditto	Ditto	...	Imprisonment of either description for 14 years and fine.	Ditto.
116	Abetment of an offence, punishable with imprisonment, if the offence be not committed in consequence of the abetment.	Ditto	...	Ditto	...	According as the offence abetted is bailable or not.	Ditto	...	Imprisonment extending to a quarter part of the longest term, and of any description, provided for the offence, or fine, or both.	Ditto.
	If the abettor or the person abetted be a public servant whose duty it is to prevent the offence.	Ditto	...	Ditto	...	Ditto	Ditto	...	Imprisonment extending to half of the longest term, and of any description, provided for the offence, or fine, or both.	Ditto.
117	Abetting the commission of an offence by the public, or by more than ten persons.	Ditto	...	Ditto	...	Ditto	Ditto	...	Imprisonment of either description for 3 years, or fine, or both.	Ditto.
118	Concealing a design to commit an offence punishable with death or transportation for life, if the offence be committed.	Ditto	...	Ditto	...	Not bailable...	Ditto	...	Imprisonment of either description for 7 years and fine.	Ditto.
	If the offence be not committed.	Ditto	...	Ditto	...	Ditto	Ditto	...	Imprisonment of either description for 3 years and fine.	Ditto.
119	A public servant concealing a design to commit an offence which it is his duty to prevent, if the offence be committed.	Ditto	...	Ditto	...	According as the offence abetted is bailable or not.	Ditto	...	Imprisonment extending to half of the longest term, and of any description, provided for the offence, or fine, or both.	Ditto.
	If the offence be punishable with death or transportation for life.	Ditto	...	Ditto	...	Not bailable	Ditto	...	Imprisonment of either description for 10 years.	Ditto.

SCHEDULE II—continued.
CHAPTER V.—ABETMENT—concluded.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether the offence is bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
119	If the offence be not committed.	May arrest without warrant if arrest for the offence abetted may be made without warrant, but not otherwise.	According as a warrant or summons may issue for the offence abetted	According as the offence is abetted is compoundable or not.	According as the offence is abetted is compoundable or not.	Imprisonment extending to a quarter part of the longest term, and of any description, provided for the offence, or fine, or both.	The Court by which the offence is triable.
120	Concealing a design to commit an offence punishable with imprisonment, if the offence be committed. If the offence be not committed.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto.
		Ditto	Ditto	Ditto	Ditto	Imprisonment extending to one-eighth part of the longest term, and of the description, provided for the offence, or fine, or both.	Ditto.

CHAPTER VI.—OFFENCES AGAINST THE STATE.

	Shall not arrest without warrant.	Warrant	Not bailable	Not compoundable.	Death, or transportation for life, and forfeiture of property.	Court of Session.
121	Waging or attempting to wage war, or abetting the waging of war, against the Queen.	...	...	...	...	...
121A	Conspiring to commit certain offences against the State.	Ditto	Ditto	Ditto	Transportation for life or any shorter term, or imprisonment of either description for 10 years.	Ditto.
122	Collecting arms, etc., with the intention of waging war against the Queen.	Ditto	Ditto	Ditto	Transportation for life, or imprisonment of either description for 10 years, and forfeiture of property.	Ditto.

123	Concealing with intent to facilitate a design to wage war.	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 10 years and fine.	Ditto.
124	Assaulting Governor General, Governor, etc., with intent to compel, or restrain the exercise of any lawful power.	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 7 years and fine.	Ditto
124A	Sedition	Ditto	...	Ditto	...	Ditto	...	Transportation for life or for any term and fine, or imprisonment of either description for 3 years and fine, or fine.	Court of Session, Chief Magistrate or District Magistrate of the first class specially empowered by the Local Government in that behalf.
125	Waging war against any Asiatic Power in alliance or at peace with the Queen or abetting the waging of such war.	Ditto	...	Ditto	...	Ditto	...	Transportation for life and fine, or imprisonment for 7 years and fine, or fine.	Court of Session.
126	Committing depredation on the territories of any Power in alliance or at peace with the Queen.	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 7 years and fine, and forfeiture of certain property.	Ditto.
127	Receiving property taken by war or depredation mentioned in Sections 125 and 126.	Ditto	...	Ditto	...	Ditto	...	Ditto	Ditto.
128	Public servant voluntarily allowing prisoner of State or war in his custody to escape.	Ditto	...	Ditto	...	Ditto	...	Transportation for life, or imprisonment of either description for 10 years, and fine.	Ditto.
129	Public servant negligently suffering prisoner of State or war in his custody to escape.	Ditto	...	Bailable	...	Ditto	...	Simple imprisonment for 3 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.

SCHEDULE II—continued.
CHAPTER VI.—OFFENCES AGAINST THE STATE—concluded.

1	2	3	4	5	6	7	8
Section	Offence.	Whether the police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
130	Aiding escape of, rescuing or harbouring, such prisoner, or offering any resistance to the re-capture of such prisoner.	Shall not arrest without warrant.	Warrant ...	Not bailable...	Not compoundable.	Transportation for life, or imprisonment of either description for 10 years and fine.	Court of Session.

CHAPTER VII.—OFFENCES RELATING TO THE ARMY AND NAVY.

1	2	3	4	5	6	7	8
Section	Offence.	Whether the police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
131	Abetting mutiny, or attempting to seduce an officer, soldier or sailor from his allegiance or duty.	May arrest without warrant.	Warrant ...	Not bailable ...	Not compoundable.	Transportation for life, or imprisonment of either description for 10 years, and fine.	Court of Session.
132	Abetment of mutiny, if mutiny is committed in consequence thereof.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Death, or transportation for life, or imprisonment of either description for 10 years and fine.	Ditto.
133	Abetment of an assault by an officer, soldier or sailor on his superior officer, when in the execution of his office.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Imprisonment of either description for 3 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
134	Abetment of such assault, if the assault is committed.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Imprisonment of either description for 7 years and fine.	Court of Session.
135	Abetment of the desertion of an officer, soldier or sailor.	Ditto ...	Ditto ...	Not bailable ...	Ditto ...	Imprisonment of either description for 2 years, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
136	Harbouring such an officer, soldier or sailor who has deserted.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Ditto.

137	Deserted concealed on board merchant-vessel, through negligence of master or person in charge thereof.	Shall not arrest without warrant	Summons	...	Ditto	...	Ditto	...	Fine of 500 rupees...	...	Ditto.
138	Abetment of act of insubordination by an officer, soldier or sailor, if the offence be committed in consequence.	May arrest without warrant.	Warrant	...	Ditto	...	Ditto	...	Imprisonment of either description for 6 months, or fine, or both.	...	Ditto.
140	Wearing the dress or carrying any token used by a soldier, with intent that it may be believed that he is such a soldier.	Ditto	Summons	...	Ditto	...	Ditto	...	Imprisonment of either description for 3 months, or fine of 500 rupees, or both.	...	Any Magistrate.

CHAPTER VIII.—OFFENCES AGAINST THE PUBLIC TRANQUILITY.

143	Being member of an unlawful assembly.	May arrest without warrant.	Summons	...	Bailable	...	Not compoundable.	...	Imprisonment of either description for 6 months, or fine, or both.	...	Any Magistrate.
144	Joining an unlawful assembly armed with any deadly weapon.	Ditto	Warrant	...	Ditto	...	Ditto	...	Imprisonment of either description for 2 years, or fine, or both.	...	Ditto.
145	Joining or continuing in an unlawful assembly, knowing that it has been commanded to disperse.	Ditto	Ditto	...	Ditto	...	Ditto	...	Ditto	...	Ditto.
147	Rioting	Ditto	Ditto	...	Ditto	...	Ditto	...	Ditto	...	Ditto.
148	Rioting, armed with a deadly weapon.	Ditto	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 3 years, or fine, or both.	...	Court of Session, President or Magistrate or Magistrate of the first class.
149	If an offence be committed by any member of an unlawful assembly, every other member of such assembly shall be guilty of the offence.	According as arrest may be made without warrant for the offence or not.	According as a warrant or summons may issue for the offence.	...	According as the offence is bailable or not.	...	Ditto	...	The same as for the offence.	...	The Court by which the offence is triable.

SCHEDULE II—continued.
CHAPTER VIII.—OFFENCES AGAINST THE PUBLIC TRANQUILLITY—continued.

1	2	3	4	5	6	7	8
Section	Offence.	Whether the police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
150	Hiring, engaging or employing persons to take part in an unlawful assembly.	May arrest without warrant.	According to the offence committed by the person hired, engaged or employed.	According as the offence is bailable or not.	Not compoundable.	The same as for a member of any offence committed by any member of such assembly.	The Court by which the offence is triable.
151	Knowingly joining or continuing in any assembly of five or more persons after it has been commanded to disperse.	Ditto	Summons	Bailable	Ditto	Imprisonment of either description for 6 months, fine, or both.	Any Magistrate.
152	Assaulting or obstructing public servant when apprehending riot, etc.	Ditto	Warrant	Ditto	Ditto	Imprisonment of either description for 3 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first class.
153	Wantonly giving provocation with intent to cause riot, if rioting be committed. If not committed ...	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 1 year, or fine, or both.	Any Magistrate.
153A	Promoting enmity between classes.	Shall not arrest without warrant	Warrant	Not bailable	Ditto	Imprisonment of either description for 2 years, or fine, or both.	Presidency Magistrate or Magistrate of the first class.
154	Owner or occupier of land not giving information of riot, etc.	Ditto	Summons	Bailable	Ditto	Fine of 1,000 rupees	Presidency Magistrate or Magistrate of the first or second class.

156	Person for whose benefit or on whose behalf a riot takes place not using all lawful means to prevent it.	Ditto	...	Ditto	...	Ditto	...	Fine ...	...	Ditto.
157	Agent of owner or occupier for whose benefit a riot is committed not using all lawful means to prevent it.	Ditto	...	Ditto	...	Ditto	...	Do. ...	...	Ditto.
158	Harbouring persons hired for an unlawful assembly.	May arrest without warrant.	...	Ditto	...	Ditto	...	Imprisonment of either description for 6 months, or fine, or both.	...	Ditto.
159	Being hired to take part in an unlawful assembly or riot.	Ditto	...	Ditto	...	Ditto	...	Ditto	...	Ditto.
160	Or to go armed ...	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 2 years, or fine, or both.	...	Ditto.
161	Committing affray	Shall not arrest without warrant	...	Summons	...	Ditto	...	Imprisonment of either description for 1 month, or fine of 100 rupees, or both.	...	Any Magistrate.

CHAPTER IX.—OFFENCES BY OR RELATING TO PUBLIC SERVANTS.

161	Being or expecting to be a public servant, and taking a gratification other than legal remuneration in respect of an official act.	Shall not arrest without warrant.	...	Summons	...	Bailable	...	Not compoundable.	...	Imprisonment of either description for 3 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first class.
162	Taking a gratification in order by corrupt or illegal means to influence a public servant.	Ditto	...	Ditto	...	Ditto	...	Ditto	...	Ditto	Ditto.
163	Taking a gratification for the exercise of personal influence with a public servant.	Ditto	...	Ditto	...	Ditto	...	Ditto	...	Simple imprisonment for 1 year, or fine, or both.	Presidency Magistrate or Magistrate of the first class.
164	Abetment by public servant of the offences defined in the last two preceding clauses with reference to himself.	Ditto	...	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 3 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first class.

SCHEDULE II—continued.
CHAPTER IX.—OFFENCES BY OR RELATING TO PUBLIC SERVANTS.—concluded.

1	2	3	4	5	6	7	8
Section	Offence.	Whether the police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
165	Public servant obtaining any valuable thing, without consideration, from a person concerned in any proceeding or business transacted by such public servant.	Shall not arrest without warrant.	Summons ...	Bailable ...	Not compoundable.	Simple imprisonment for 2 years, or fine or both.	Presidency Magistrate, or Magistrate of the first or second class.
166	Public servant disobeying a direction of the law with intent to cause injury to any person.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Simple imprisonment for 1 year, or fine, or both.	Ditto.
167	Public servant framing an incorrect document with intent to cause injury.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Imprisonment of either description for 3 years, or fine, or both.	Court of Session, Presidency Magistrate, or Magistrate of the first class.
168	Public servant unlawfully engaging in trade.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Simple imprisonment for 1 year, or fine, or both.	Presidency Magistrate or Magistrate of the first class.
169	Public servant unlawfully buying or bidding for property.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Simple imprisonment for 2 years, or fine, or both, and confiscation of property, if purchased.	Ditto.
170	Personating a public servant	May arrest without warrant.	Warrant ...	Ditto ...	Ditto ...	Imprisonment of either description for 2 years, or fine, or both.	Any Magistrate.
171	Wearing garb or carrying token used by public servant with fraudulent intent.	Ditto ...	Summons ...	Ditto ...	Ditto ...	Imprisonment of either description for 8 months, or fine of 200 rupees, or both.	Ditto.

CHAPTER X.—CONTEMPTS OF THE LAWFUL AUTHORITY OF PUBLIC SERVANTS.

172	Abducting to avoid service of summons or other proceeding from a public servant.	Shall not arrest without warrant.	Summons	Bailable	Not compound-able.	Simple imprisonment for 1 month, or fine of 500 rupees, or both.	Any Magistrate.
	If summons or notice require attendance in person, etc., in a Court of Justice.	Ditto	Ditto	Ditto	Ditto	Simple imprisonment for 6 months, or fine of 1,000 rupees, or both.	Ditto.
173	Preventing the service or the affixing of any summons or notice, or the removal of it when it has been affixed, or preventing a proclamation.	Ditto	Ditto	Ditto	Ditto	Simple imprisonment for 1 month, or fine of 500 rupees, or both.	Presidency Magistrate, or Magistrate of the first or second class.
	If summons, etc., require attendance in person, etc., in a Court of Justice.	Ditto	Ditto	Ditto	Ditto	Simple imprisonment for 6 months, or fine of 1,000 rupees, or both.	Presidency Magistrate, or Magistrate of the first or second class.
174	Not obeying a legal order to attend at a certain place in person or by agent, or departing therefrom without authority.	Ditto	Ditto	Ditto	Ditto	Simple imprisonment for 1 month, or fine of 500 rupees, or both.	Any Magistrate.
	If the order require personal attendance, etc., in a Court of Justice.	Ditto	Ditto	Ditto	Ditto	Simple imprisonment for 6 months, or fine of 1,000 rupees, or both.	Ditto.
175	Intentionally omitting to produce a document to a public servant by a person legally bound to produce or deliver such document.	Ditto	Ditto	Ditto	Ditto	Simple imprisonment for 1 month, or fine of 500 rupees, or both.	The Court in which the offence is committed, subject to the provisions of Chapter XXXV; or, if not committed in a Court, a Presidency Magistrate or Magistrate of the first or second class.

SCHEDULE II—continued.

CHAPTER X.—CONTEMPTS OF THE LAWFUL AUTHORITY OF PUBLIC SERVANTS—continued.

Section.	2	3	4	5	6	7	8
	Offence.	Whether the police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
175	If the document is required to be produced in or delivered to a Court of Justice.	Shall not arrest without warrant.	Summons ...	Bailable ...	Not compoundable.	Simple imprisonment for 6 months, or fine of 1,000 rupees, or both.	The Court in which the offence is committed, subject to the provisions of Chapter XXV; or, if not committed in a Court, a Presidency Magistrate, or Magistrate of the first or second class.
176	Intentionally omitting to give notice or information to a public servant by a person legally bound to give such notice or information. If the notice or information required respects the commission of an offence, etc.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Simple imprisonment for 1 month, or fine of 500 rupees, or both.	Presidency Magistrate, or Magistrate of the first or second class.
177	Knowingly furnishing false information to a public servant. If the information required respects the commission of an offence, etc.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Simple imprisonment for 6 months, or fine of 1,000 rupees, or both. Ditto ...	Ditto. Ditto.
		Ditto ...	Ditto ...	Ditto ...	Ditto ...	Imprisonment of either description for 3 years, or fine, or both.	Ditto.

178	Refusing oath when duly required to take oath by a public servant.	Ditto	...	Ditto	...	Ditto	...	Ditto	...	Simple imprisonment for 6 months, or fine of 1,000 rupees, or both.	The Court in which the offence is committed, subject to the provisions of Chapter XXXV; or, if not committed in a Court, a Presidency Magistrate or Magistrate of the first or second class.
179	Being legally bound to state truth, and refusing to answer questions.	Ditto	...	Ditto	...	Ditto	...	Ditto	...	Ditto	Ditto.
180	Refusing to sign a statement made to a public servant when legally required to do so.	Ditto	...	Ditto	...	Ditto	...	Ditto	...	Simple imprisonment for 3 months, or fine of 500 rupees, or both.	Ditto.
181	Knowingly stating to a public servant on oath as true that which is false.	Ditto	...	Warrant	...	Ditto	...	Ditto	...	Imprisonment of either description for 3 years, and fine.	Court of Session, Presidency Magistrate, or Magistrate of the first class.
182	Giving false information to a public servant in order to cause him to use his lawful power to the injury or annoyance of any person.	Ditto	...	Summons	...	Ditto	...	Ditto	...	Imprisonment of either description for 6 months, or fine of 1,000 rupees, or both.	Presidency Magistrate or Magistrate of the first or second class.
183	Resistance to the taking of property by the lawful authority of a public servant.	Ditto	...	Ditto	...	Ditto	...	Ditto	...	Ditto	Ditto.
184	Obstructing sale of property offered for sale by authority of a public servant.	Ditto	...	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 1 month or fine of 500 rupees, or both.	Ditto.

SCHEDULE II—continued.
CHAPTER X.—CONTEMPTS OF THE LAWFUL AUTHORITY OF PUBLIC SERVANTS—continued.

Section.	2	3	4	5	6	7	8
	Offence.	Whether the police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
175	If the document is required to be produced in or delivered to a Court of Justice.	Shall not arrest without warrant.	Summons ...	Bailable. ...	Not compoundable.	Simple imprisonment for 6 months, or fine of 1,000 rupees, or both.	The Court in which offence is committed, subject to the provisions of Chapter XXXV; or, if not committed in a Court, a Presidency Magistrate, or Magistrate of the first or second class.
176	Intentionally omitting to give notice or information to a public servant by a person legally bound to give such notice or information.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Simple imprisonment for 1 month, or fine of 500 rupees, or both.	Presidency Magistrate, or Magistrate of the first or second class.
177	If the notice or information required respects the commission of an offence, etc.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Simple imprisonment for 6 months, or fine of 1,000 rupees, or both.	Ditto.
	Knowingly furnishing false information to a public servant.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Ditto	Ditto.
	If the information required respects the commission of an offence, etc.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Imprisonment of either description for 2 years, or fine, or both.	Ditto.

178	Refusing oath when duly required to take oath by a public servant.	Ditto	...	Ditto	...	Ditto	...	Ditto	...	Simple imprisonment for 6 months, or fine of 1,000 rupees, or both.	The Court in which the offence is committed, subject to the provisions of Chapter XXXV; or, if not committed in a Court, a Presidency Magistrate or Magistrate of the first or second class.
179	Being legally bound to state truth, and refusing to answer questions.	Ditto	...	Ditto	...	Ditto	...	Ditto	...	Ditto	Ditto.
180	Refusing to sign a statement made to a public servant when legally required to do so.	Ditto	...	Ditto	...	Ditto	...	Ditto	...	Simple imprisonment for 3 months, or fine of 500 rupees, or both.	Ditto.
181	Knowingly stating to a public servant on oath as true that which is false.	Ditto	...	Warrant	...	Ditto	...	Ditto	...	Imprisonment of either description for 3 years, and fine.	Court of Session, Presidency Magistrate, or Magistrate of the first class.
182	Giving false information to a public servant in order to cause him to use his lawful power to the injury or annoyance of any person.	Ditto	...	Summons	...	Ditto	...	Ditto	...	Imprisonment of either description for 6 months, or fine of 1,000 rupees, or both.	Presidency Magistrate or Magistrate of the first or second class.
183	Resistance to the taking of property by the lawful authority of a public servant.	Ditto	...	Ditto	...	Ditto	...	Ditto	...	Ditto	Ditto.
184	Obstructing sale of property offered for sale by authority of a public servant.	Ditto	...	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 1 month or fine of 500 rupees, or both.	Ditto.

SCHEDULE II—continued.
CHAPTER X.—CONTEMPTS OF THE LAWFUL AUTHORITY OF PUBLIC SERVANTS—concluded.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
185	Bidding, by a person under a legal incapacity to purchase it, for property at a lawfully authorised sale, or bidding without intending to perform the obligations incurred thereby.	Shall not arrest without warrant.	Summons	Bailable	Not compoundable.	Imprisonment of either description for 1 month, or fine of 200 rupees, or both.	Presidency Magistrate or Magistrate of the first or second class.
186	Obstructing public servant in discharge of his public functions.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 3 months, or fine of 500 rupees, or both.	Ditto.
187	Omission to assist public servant when bound by law to give such assistance. Wilfully neglecting to aid a public servant who demands aid in the execution of process, the prevention of offences, etc.	Ditto	Ditto	Ditto	Ditto	Simple imprisonment for 1 month, or fine of 200 rupees, or both.	Ditto.
188	Disobedience to an order lawfully promulgated by a public servant, if such disobedience causes obstruction, annoyance or injury to persons lawfully employed. If such disobedience causes danger to human life, health or safety, etc.	Ditto	Ditto	Ditto	Ditto	Simple imprisonment for 1 month, or fine of 200 rupees, or both.	Ditto.
		Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 6 months, or fine of 500 rupees, or both.	Ditto.
		Ditto	Ditto	Ditto	Ditto	Simple imprisonment for 1 month, or fine of 200 rupees, or both.	Ditto.
		Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 6 months, or fine of 1,000 rupees, or both.	Ditto.

CHAPTER XI.—FALSE EVIDENCE AND OFFENCES AGAINST PUBLIC JUSTICE.

180	Threatening a public servant with injury to him, or one in whom he is interested, to induce him to do or forbear to do any official act.	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 2 years, or fine, or both.	Ditto.
180	Threatening any person to induce him to refrain from making a legal application for protection from injury.	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 1 year, or fine, or both.	Ditto.
193	Giving or fabricating false evidence in a judicial proceeding.	Shall not arrest without warrant.	...	Bailable	...	Not compoundable.	...	Imprisonment of either description for 7 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
194	Giving or fabricating false evidence in any other case.	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 3 years and fine.	Ditto.
194	Giving or fabricating false evidence with intent to cause any person to be convicted of a capital offence.	Ditto	...	Ditto	...	Ditto	...	Transportation for life, or rigorous imprisonment for 10 years and fine.	Court of Session.
195	If innocent person be thereby convicted and executed.	Ditto	...	Ditto	...	Ditto	...	Death or as above	Ditto.
195	Giving or fabricating false evidence with intent to procure conviction of an offence punishable with transportation for life or with imprisonment for seven years or upwards.	Ditto	...	Ditto	...	Ditto	...	The same as for the offence.	Ditto.
196	Using in a judicial proceeding evidence known to be false or fabricated.	Ditto	...	According as the offence of giving such evidence is bailable or not.	...	Ditto	...	The same as for giving or fabricating false evidence.	Court of Session, Presidency Magistrate or Magistrate of the first class.

SCHEDULE II—continued.
CHAPTER X.—CONTEMPTS OF THE LAWFUL AUTHORITY OF PUBLIC SERVANTS—concluded.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
185	Bidding, by a person under a legal incapacity to purchase it, for property at a lawfully authorised sale, or bidding without intending to perform the obligations incurred thereby.	Shall not arrest without warrant.	Summons ...	Bailable ...	Not compoundable.	Imprisonment of either description for 1 month, or fine of 200 rupees, or both.	Presidency Magistrate or Magistrate of the first or second class.
186	Obstructing public servant in discharge of his public functions.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Imprisonment of either description for 8 months, or fine of 500 rupees, or both.	Ditto.
187	Omission to assist public servant when bound by law to give such assistance. Wilfully neglecting to aid a public servant who demands aid in the execution of process, the prevention of offences, etc.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Simple imprisonment for 1 month, or fine of 200 rupees, or both.	Ditto.
188	Disobedience to an order lawfully promulgated by a public servant, if such disobedience causes obstruction, annoyance or injury to persons lawfully employed. If such disobedience causes danger to human life, health or safety, etc.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Simple imprisonment for 1 month, or fine of 200 rupees, or both.	Ditto.
		Ditto ...	Ditto ...	Ditto ...	Ditto ...	Imprisonment of either description for 6 months, or fine of 1,000 rupees, or both.	Ditto.

189	Threatening a public servant with injury to him, or one in whom he is interested, to induce him to do or forbear to do any official act.	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 2 years, or fine, or both.	Ditto.
190	Threatening any person to induce him to refrain from making a legal application for protection from injury.	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 1 year, or fine, or both.	Ditto.
CHAPTER XI.—FALSE EVIDENCE AND OFFENCES AGAINST PUBLIC JUSTICE.									
193	Giving or fabricating false evidence in a judicial proceeding.	Shall not arrest without warrant.	Warrant	...	Bailable	...	Not compoundable.	Imprisonment of either description for 7 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
194	Giving or fabricating false evidence in any other case.	Ditto	Ditto	...	Ditto	...	Ditto	Imprisonment of either description for 3 years and fine.	Ditto.
	Giving or fabricating false evidence with intent to cause any person to be convicted of a capital offence.	Ditto	Ditto	...	Not bailable...	...	Ditto	Transportation for life, or rigorous imprisonment for 10 years and fine.	Court of Session.
195	If innocent person be there-by convicted and executed.	Ditto	Ditto	...	Ditto	...	Ditto	Death or as above	Ditto.
	Giving or fabricating false evidence with intent to procure conviction of an offence punishable with transportation for life or with imprisonment for seven years or upwards.	Ditto	Ditto	...	Bailable	...	Ditto	The same as for the offence.	Ditto.
196	Using in a judicial proceeding evidence known to be false or fabricated.	Ditto	Ditto	...	According as the offence of giving such evidence is bailable or not.	...	Ditto	The same as for giving or fabricating false evidence.	Court of Session, Presidency Magistrate or Magistrate of the first class.

SCHEDULE II.—continued.

CHAPTER XI.—FALSE EVIDENCE AND OFFENCES AGAINST PUBLIC JUSTICE—continued.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
197	Knowingly issuing or signing a false certificate relating to any fact of which such certificate is by law admissible in evidence.	Shall not arrest without warrant.	Warrant	Bailable	Not compoundable.	The same as for giving false evidence.	Court of Session, Presidency Magistrate or Magistrate of the first class.
198	Using as a true certificate one known to be false in a material point.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto.
199	False statement made in any declaration which is by law receivable as evidence.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto.
200	Using as true any such declaration known to be false.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto.
201	Causing disappearance of evidence of an offence committed, or giving false information touching it to screen the offender, if a capital offence.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years and fine.	Court of Session.
	If punishable with transportation for life or imprisonment for 10 years.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.

	If punishable with less than 10 years' imprisonment.	Ditto	...	Ditto	...	Ditto	...	Imprisonment for a quarter of the longest term, and of the description, provided for the offence, or fine, or both.	Presidency Magistrate, or Magistrate of the first class, or Court by which the offence is triable.
202	Intentional omission to give information of an offence by a person legally bound to inform.	Ditto	...	Summons	...	Ditto	...	Imprisonment of either description for 6 months, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
203	Giving false information respecting an offence committed.	Ditto	...	Warrant	...	Ditto	...	Imprisonment of either description for 2 years, or fine, or both.	Ditto.
204	Secreting or destroying any document to prevent its production as evidence.	Ditto	...	Ditto	...	Ditto	...	Ditto	Presidency Magistrate or Magistrate of the first class.
205	False personation for the purpose of any act or proceeding in a suit or criminal prosecution, or for becoming bail or security.	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 3 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first class.
206	Fraudulent removal or concealment, &c., of property to prevent its seizure as a forfeiture, or in satisfaction of a fine under sentence, or in execution of a decree.	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 2 years, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
207	Claiming property without right, or practising deception touching any right to it, to prevent its being taken as a forfeiture, or in satisfaction of a fine under sentence, or in execution of a decree.	Ditto	...	Ditto	...	Ditto	...	Ditto	Ditto.

SCHEDULE II—continued.
CHAPTER XI.—FALSE EVIDENCE AND OFFENCES AGAINST PUBLIC JUSTICE—continued.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
208	Fraudulently suffering a decree to pass for a sum not due, or suffering a decree to be executed after it has been satisfied.	Shall not arrest without warrant.	Warrant ...	Bailable ...	Not compoundable.	Imprisonment of either description for 2 years, or fine, or both.	Presidency Magistrate or Magistrate of the first class.
209	False claim in a Court of Justice.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Imprisonment of either description for 2 years and fine.	Ditto.
210	Fraudulently obtaining a decree for a sum not due, or causing a decree to be executed after it has been satisfied.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Imprisonment of either description for 2 years, or fine, or both.	Ditto.
211	False charge of offence made with intent to injure. If offences charged be punishable with imprisonment for seven years or upwards.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Ditto.
	If offence charged be capital, or punishable with transportation for life.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Imprisonment of either description for 7 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
212	Harbouring an offender, if the offence be capital.	May arrest without warrant.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Court of Session.
			Ditto ...	Ditto ...	Ditto ...	Imprisonment of either description for 5 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.

213	If punishable with transportation for life, or with imprisonment for 10 years. If punishable with imprisonment for 1 year and not for 10 years. Taking gift, etc., to screen an offender from punishment, if the offence be capital. If punishable with transportation for life, or with imprisonment for 10 years. If with imprisonment for less than 10 years.	Ditto	...	Ditto	...	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 3 years and fine. Imprisonment for a quarter of the longest term, and of the description, provided for the offence, or fine, or both. Imprisonment of either description for 7 years and fine. Imprisonment of either description for 3 years and fine. Imprisonment for a quarter of the longest term, and of the description, provided for the offence, or fine, or both. Imprisonment of either description for 7 years and fine.	Ditto	...	Ditto	...	Ditto	...	Ditto	...	Ditto	...	Court of Session, Presidency Magistrate or Magistrate of the first class. Court of Session, Presidency Magistrate or Magistrate of the first class, or Court by which the offence is triable. Court of Session, Presidency Magistrate or Magistrate of the first class. Court of Session, Presidency Magistrate or Magistrate of the first class, or Court by which the offence is triable. Court of Session, Presidency Magistrate or Magistrate of the first class. Court of Session, Presidency Magistrate or Magistrate of the first class, or Court by which the offence is triable.
214	Offering gift or restoration of property in consideration of screening offender, if the offence be capital. If punishable with transportation for life or with imprisonment for 10 years. If with imprisonment for less than 10 years.	Ditto	...	Ditto	...	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 3 years and fine. Imprisonment for a quarter of the longest term, and of the description, provided for the offence, or fine, or both.	Ditto	...	Ditto	...	Ditto	...	Ditto	...	Ditto	...	Court of Session, Presidency Magistrate or Magistrate of the first class. Court of Session, Presidency Magistrate or Magistrate of the first class, or Court by which the offence is triable. Court of Session, Presidency Magistrate or Magistrate of the first class. Court of Session, Presidency Magistrate or Magistrate of the first class, or Court by which the offence is triable.

SCHEDULE II—continued.
CHAPTER XI.—FALSE EVIDENCE AND OFFENCES AGAINST PUBLIC JUSTICE—continued.

Section.	2	3	4	5	6	7	8
	Offence.	Whether the police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
215	Taking gift to help to recover moveable property of which a person has been deprived by an offence, without causing apprehension of offender.	Shall not arrest without warrant.	Warrant. ...	Bailable ...	Not compoundable.	Imprisonment of either description for 2 years, or fine, or both.	Presidency Magistrate or Magistrate of the first class.
216	Harbouring an offender who has escaped from custody, or whose apprehension has been ordered, if the offence be capital. If punishable with transportation for life, or with imprisonment for 10 years. If with imprisonment for 1 year, and not for 10 years.	May arrest without warrant. Ditto ... Ditto ...	Ditto ... Ditto ... Ditto ...	Ditto ... Ditto ... Ditto ...	Ditto ... Ditto ... Ditto ...	Imprisonment of either description for 7 years and fine. Imprisonment of either description for 3 years, with or without fine. Imprisonment for a quarter of the longest term, and of the description provided for the offence, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first class. Ditto. Presidency Magistrate or Magistrate of the first class, or Court by which the offence is triable.
217	Harbouring robbers or dacoits	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Rigorous imprisonment for 7 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
	Public servant disobeying a direction of law with intent to save person from punishment, or property from forfeiture.	Shall not arrest without warrant.	Summons ...	Ditto ...	Ditto ...	Imprisonment of either description for 2 years, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.

218	Public servant framing an incorrect record or writing with intent to save person from punishment, or property from forfeiture.	Ditto	...	Warrant	...	Ditto	...	Ditto	...	Imprisonment of either description for 3 years, or fine, or both.	Court of Session.
219	Public servant in a judicial proceeding corruptly making and pronouncing an order, report, verdict or decision which he knows to be contrary to law.	Ditto	...	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 7 years, or fine, or both.	Ditto.
220	Commitment for trial or confinement by a person having authority, who knows that he is acting contrary to law.	Ditto	...	Ditto	...	Ditto	...	Ditto	...	Ditto	Ditto.
221	Intentional omission to apprehend on the part of a public servant bound by law to apprehend an offender, if the offence be capital. If punishable with transportation for life or imprisonment for 10 years.	Ditto	...	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 7 years, with or without fine.	Ditto.
										Imprisonment of either description for 3 years, with or without fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
	If with imprisonment for less than 10 years.	Ditto	...	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 2 years, with or without fine.	Presidency Magistrate or Magistrate of the first or second class.
222	Intentional omission to apprehend on the part of a public servant bound by law to apprehend person under sentence of a Court of Justice if under sentence of death.	Ditto	...	Ditto	...	Not bailable	...	Ditto	...	Transportation for life, or imprisonment of either description for 14 years, with or without fine.	Court of Session.
	If under sentence of transportation or penal servitude for life, or transportation, imprisonment or penal servitude for 10 years or upwards.	Ditto	...	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 7 years, with or without fine.	Ditto.

SCHEDULE II—continued.
CHAPTER XI.—FALSE EVIDENCE AND OFFENCES AGAINST PUBLIC JUSTICE—continued.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
222	If under sentence of imprisonment for less than 10 years or lawfully committed to custody.	Shall not arrest without warrant.	Warrant ...	Bailable ...	Not compoundable.	Imprisonment of either description for 3 years, or fine, or both.	Court of Session, Presidency or Magistrate of the first class.
223	Escape from confinement negligently suffered by a public servant.	Ditto ...	Summons ...	Ditto ...	Ditto ...	Simple imprisonment for 2 years, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
224	Resistance or obstruction by a person to his lawful apprehension.	May arrest without warrant.	Warrant ...	Ditto ...	Ditto ...	Imprisonment of either description for 2 years, or fine, or both.	Ditto.
225	Resistance or obstruction to the lawful apprehension of another person, or rescuing him from lawful custody.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Ditto.
	If charged with an offence punishable with transportation for life, or imprisonment for 10 years.	Ditto ...	Ditto ...	Not bailable	Ditto ...	Imprisonment of either description for 3 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
	If charged with a capital offence.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Imprisonment of either description for 7 years and fine.	Court of Session

225A	If the person is sentenced to transportation for life, or to transportation, penal servitude or imprisonment for 10 years or upwards.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Ditto ...
	If under sentence of death.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Ditto ...
	Omission to apprehend, or suzerance of escape, on part of public servant, in cases not otherwise provided for—	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Ditto ...
	(a) in case of intentional omission or suzerance;	Shall not arrest without warrant.	Ditto ...	Ditto ...	Bailable	Ditto ...	Ditto ...	Transportation for life, or imprisonment of either description for 10 years and fine.
225B	(b) in case of negligent omission or suzerance.	Ditto ...	Summons ...	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Imprisonment of either description for 3 years, or fine, or both.
	Resistance or obstruction to lawful apprehension, or escape or rescue, in cases not otherwise provided for.	May arrest without warrant.	Warrant	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Simple imprisonment for 2 years, or fine, or both.
	Unlawful return from transportation.	Ditto ...	Ditto ...	Ditto ...	Not bailable	Ditto ...	Ditto ...	Imprisonment of either description for 6 months, or fine, or both.
226		Ditto ...	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Transportation for life, and fine and rigorous imprisonment for 3 years before transportation.
227	Violation of condition of remission of punishment.	Shall not arrest without warrant.	Summons	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Punishment of original sentence, or if part of the punishment has been undergone, the residue.
228	Intentional insult or interruption to a public servant sitting in any stage of a judicial proceeding.	Ditto ...	Ditto ...	Ditto ...	Bailable	Ditto ...	Ditto ...	Simple imprisonment for 6 months, or fine of 1,000 rupees, or both.

Court of Session, Presidency Magistrate or Magistrate of the first class
Presidency Magistrate or Magistrate of the first or second class.
Ditto.

Court of Session

The Court by which the original offence was triable.
The Court in which the offence is committed, subject to the provisions of Chapter XXXV.

SCHEDULE II—continued.
CHAPTER XI.—FALSE EVIDENCE AND OFFENCES AGAINST PUBLIC JUSTICE—concluded.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
229	Personation of a juror or assessor.	Shall not arrest without warrant.	Summons ...	Bailable ...	Not compoundable.	Imprisonment of either description for 2 years, or fine, or both.	Presidency Magistrate or Magistrate of the first class.

CHAPTER XII.—OFFENCES RELATING TO COIN AND GOVERNMENT STAMPS.

		May arrest without warrant.	Warrant	Not bailable...	Not compoundable.	Imprisonment of either description for 7 years and fine.	Court of Session.
231	Counterfeiting, or performing any part of the process of counterfeiting, coin.						
232	Counterfeiting, or performing any part of the process of counterfeiting, the Queen's coin.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Transportation for life, or imprisonment of either description for 10 years and fine.	Ditto.
233	Making, buying or selling instrument for the purpose of counterfeiting coin.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Imprisonment of either description for 3 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
234	Making, buying or selling instrument for the purpose of counterfeiting the Queen's coin.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Imprisonment of either description for 7 years and fine.	Court of Session.
235	Possession of instrument or material for the purpose of using the same for counterfeiting coin.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Imprisonment of either description for 3 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.

236	If Queen's coin	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 10 years and fine.	Court of Session.
	Abetting in British India the counterfeiting out of British India of coin.	Ditto	...	Ditto	...	Ditto	...	The punishment provided for abetting the counterfeiting of such coin within British India.	Ditto.
237	Import or export of counterfeit coin, knowing the same to be counterfeit.	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 3 years and fine.	Court of Session, Presidency Magistrate, or Magistrate of the first class.
238	Import or export of counterfeit coin, knowing the same to be counterfeit.	Ditto	...	Ditto	...	Ditto	...	Transportation for life or imprisonment of either description for 10 years and fine.	Court of Session.
239	Having any counterfeit coin known to be such when it came into possession, and delivering, etc., the same to any person.	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 5 years and fine.	Court of Session, Presidency Magistrate, or Magistrate of the first class.
240	The same with respect to the Queen's coin.	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 10 years and fine.	Ditto.
241	Knowingly delivering to another any counterfeit coin as genuine which, when first possessed, the deliverer did not know to be counterfeit.	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 2 years, or fine of ten times the value of the coin counterfeited, or both.	Presidency Magistrate, or Magistrate of the first or second class.
242	Possession of counterfeit coin by a person who knew it to be counterfeit when he became possessed thereof.	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 3 years and fine.	Court of Session, Presidency Magistrate, or Magistrate of the first class.
243	Possession of Queen's coin by a person who knew it to be counterfeit when he became possessed thereof.	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 7 years and fine.	Ditto.

SCHEDULE II—continued.
CHAPTER XII. OFFENCES RELATING TO COIN AND GOVERNMENT STAMPS—continued.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
244	Person employed in a Mint causing coin to be of a different weight or composition from that fixed by law.	May arrest without warrant.	Warrant	Not bailable...	Not compoundable.	Imprisonment of either description for 7 years and fine.	Court of Session.
245	Unlawfully taking from a Mint any coining instrument.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
246	Fraudulently diminishing the weight or altering the composition of any coin.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
247	Fraudulently diminishing the weight or altering the composition of the Queen's coin.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years and fine.	Ditto.
248	Altering appearance of any coin with intent that it shall pass as a coin of a different description.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years and fine.	Ditto
249	Altering appearance of the Queen's coin with intent that it shall pass as a coin of a different description.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years and fine.	Ditto
250	Delivery to another of coin possessed with the knowledge that it is altered.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 5 years and fine.	Ditto

231	Delivery of Queen's coin possessed with the knowledge that it is altered.	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 10 years and fine.	Ditto.
232	Possession of altered coin by a person who knew it to be altered when he became possessed thereof.	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 3 years and fine.	Ditto.
233	Possession of Queen's coin by a person who knew it to be altered when he became possessed thereof.	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 5 years and fine.	Ditto
234	Delivery to another of coin as genuine which, when first possessed, the deliverer did not know to be altered.	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 2 years, or fine of ten times the value of the coin.	Presidency Magistrate or Magistrate of the first or second class.
235	Counterfeiting a Government stamp.	Ditto	...	Ditto	...	Bailable	...	Transportation for life, or imprisonment of either description for 10 years, and fine.	Court of Session.
236	Having possession of an instrument or material for the purpose of counterfeiting a Government stamp.	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 7 years and fine.	Ditto.
237	Making, buying or selling instrument for the purpose of counterfeiting a Government stamp.	Ditto	...	Ditto	...	Ditto	...	Ditto	Ditto.
238	Sale of counterfeit Government stamp.	Ditto	...	Ditto	...	Ditto	...	Ditto	Ditto.
239	Having possession of a counterfeit Government stamp.	Ditto	...	Ditto	...	Ditto	...	Ditto	Court of Session, Presidency Magistrate or Magistrate of first class.
240	Using as genuine a Government stamp known to be counterfeit.	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 7 years, or fine, or both.	Ditto.

SCHEDULE II—continued.
CHAPTER XII. OFFENCES RELATING TO COIN AND GOVERNMENT STAMPS—continued.

Section.	2	3	4	5	6	7	8
	Offence.	Whether the police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
244	Person employed in a Mint causing coin to be of a different weight or composition from that fixed by law.	May arrest without warrant.	Warrant	Not bailable...	Not compoundable.	Imprisonment of either description for 7 years and fine.	Court of Session.
245	Unlawfully taking from a Mint any coining instrument.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
246	Fraudulently diminishing the weight or altering the composition of any coin.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
247	Fraudulently diminishing the weight or altering the composition of the Queen's coin.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years and fine.	Ditto.
248	Altering appearance of any coin with intent that it shall pass as a coin of a different description.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years and fine.	Ditto
249	Altering appearance of the Queen's coin with intent that it shall pass as a coin of a different description.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years and fine.	Ditto
250	Delivery to another of coin possessed with the knowledge that it is altered.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 5 years and fine.	Ditto

251	Delivery of Queen's coin possessed with the knowledge that it is altered.	Ditto	...	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 10 years and fine.	Ditto.
252	Possession of altered coin by a person who knew it to be altered when he became possessed thereof.	Ditto	...	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 3 years and fine.	Ditto.
253	Possession of Queen's coin by a person who knew it to be altered when he became possessed thereof.	Ditto	...	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 5 years and fine.	Ditto
254	Delivery to another of coin as genuine which, when first possessed, the deliverer did not know to be altered.	Ditto	...	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 2 years, or fine of ten times the value of the coin.	Presidency Magistrate or Magistrate of the first or second class.
255	Counterfeiting a Government stamp.	Ditto	...	Ditto	...	Bailable	...	Ditto	...	Transportation for life, or imprisonment of either description for 10 years, and fine.	Court of Session.
256	Having possession of an instrument or material for the purpose of counterfeiting a Government stamp.	Ditto	...	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 7 years and fine.	Ditto.
257	Making, buying or selling instrument for the purpose of counterfeiting a Government stamp.	Ditto	...	Ditto	...	Ditto	...	Ditto	...	Ditto	Ditto.
258	Sale of counterfeit Government stamp.	Ditto	...	Ditto	...	Ditto	...	Ditto	...	Ditto	Ditto.
259	Having possession of a counterfeit Government stamp.	Ditto	...	Ditto	...	Ditto	...	Ditto	...	Ditto	Court of Session, Presidency Magistrate or Magistrate of first class.
260	Using as genuine a Government stamp known to be counterfeit.	Ditto	...	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 7 years, or fine, or both.	Ditto.

SCHEDULE II—continued.
CHAPTER XII.—OFFENCES RELATING TO COIN AND GOVERNMENT STAMPS—concluded.

Section.	2	3	4	5	6	7	8
	Offence.	Whether the police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
261	Effacing any writing from a substance bearing a Government stamp, or removing from a document a stamp used for it with intent to cause loss to Government.	May arrest without warrant.	Warrant ...	Bailable ...	Not compoundable.	Imprisonment of either description for 3 years, or fine, or both.	Presidency Magistrate or Magistrate of the first class.
262	Using a Government stamp known to have been before used.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Imprisonment of either description for 2 years, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
263	Eraseure of mark denoting that stamp has been used.	Ditto ...	Ditto	Ditto ...	Ditto ...	Imprisonment of either description for 3 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first class.
263A	Fictitious stamps ...	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Fine of 200 rupees ...	Presidency Magistrate or Magistrate of the first class.

CHAPTER XIII.—OFFENCES RELATING TO WEIGHTS AND MEASURES.

	264	265
	Fraudulent use of false instrument for weighing.	Fraudulent use of false weight or measure.
	Shall not arrest without warrant.	Ditto ...
	Summons ...	Ditto ...
	Bailable ...	Ditto ...
	Not compoundable.	Ditto ...
	Imprisonment of either description for 1 year, or fine, or both.	Ditto ...
	Presidency Magistrate or Magistrate of the first or second class.	Ditto.

CHAPTER XIV.--OFFENCES AFFECTING THE PUBLIC HEALTH, SAFETY, CONVENIENCE, DECENTY AND MORALS.									
266	Being in possession of false weights or measures for fraudulent use.	Ditto	...	Ditto	...	Ditto	...	Ditto	...
267	Making or selling false weights, or measures for fraudulent use.	Ditto	...	Ditto	...	Ditto	...	Ditto	...
269	Negligently doing any act known to be likely to spread infection of any disease dangerous to life.	May arrest without warrant.	...	Summons	...	Bailable	...	Not compoundable.	Imprisonment of either description for 6 months, or fine, or both.
270	Malignantly doing any act known to be likely to spread infection of any disease dangerous to life.	Ditto	...	Ditto	...	Ditto	...	Ditto	Imprisonment of either description for 2 years, or fine, or both.
271	Knowingly disobeying any quarantine rule.	Shall not arrest without warrant.	...	Ditto	...	Ditto	...	Ditto	Imprisonment of either description for 6 months, or fine, or both.
272	Adulterating food or drink intended for sale, so as to make the same noxious.	Ditto	...	Ditto	...	Ditto	...	Ditto	Imprisonment of either description for 6 months, or fine of 1,000 rupees, or both.
273	Selling any food or drink as food and drink, knowing the same to be noxious.	Ditto	...	Ditto	...	Ditto	...	Ditto	...
274	Adulterating any drug or medical preparation intended for sale so as to lessen its efficacy, or to change its operation, or to make it noxious.	Ditto	...	Ditto	...	Ditto	...	Ditto	...
275	Offering for sale or issuing from a dispensary any drug or medical preparation known to have been adulterated.	Ditto	...	Ditto	...	Ditto	...	Ditto	...

SCHEDULE II—continued.
CHAPTER XIV.—OFFENCES AFFECTING THE PUBLIC HEALTH, SAFETY, CONVENIENCE, DECENCY AND MORALS—continued.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
276	Knowingly selling or issuing from a dispensary any drug or medical preparation as a different drug or medical preparation.	Shall not arrest without warrant.	Summons	Bailable	Not compoundable.	Imprisonment of either description for six months, or fine of 1,000 rupees, or both.	Presidency Magistrate or Magistrate of the first or second class.
277	Defiling the water of a public spring or reservoir.	May arrest without warrant.	Ditto	Ditto	Ditto	Imprisonment of either description for 3 months, or fine of 500 rupees, or both.	Any Magistrate.
278	Making atmosphere noxious to health.	Shall not arrest without warrant.	Ditto	Ditto	Ditto	Fine of 500 rupees	Ditto.
279	Driving or riding on a public way so rashly or negligently as to endanger human life, &c.	May arrest without warrant.	Ditto	Ditto	Ditto	Imprisonment of either description for 6 months, or fine of 1,000 rupees, or both.	Ditto.
290	Navigating any vessel so rashly or negligently as to endanger human life, &c.	Ditto	Ditto	Ditto	Ditto	Ditto	Presidency Magistrate or Magistrate of the first or second class.
291	Exhibition of a false light, mark or buoy.	Ditto	Warrant	Ditto	Ditto	Imprisonment of either description for 7 years, or fine, or both.	Court of Session.
292	Conveying for hire any person by water, in a vessel in such a state, or so loaded, as to endanger his life.	Ditto	Summons	Ditto	Ditto	Imprisonment of either description for 6 months, or fine of 1,000 rupees, or both.	Presidency Magistrate or Magistrate of the first or second class.

283	Causing danger, obstruction or injury in any public way or line of navigation.	Ditto	...	Ditto	...	Ditto	...	Ditto	...	Fine of 200 rupees	...	Ditto.
284	Dealing with any poisonous substance so as to endanger human life, &c.	Shall not arrest without warrant.	...	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 6 months, or fine of 1,000 rupees, or both.	...	Ditto.
285	Dealing with fire or any combustible matter so as to endanger human life, &c.	May arrest without warrant.	...	Ditto	...	Ditto	...	Ditto	...	Ditto	...	Any Magistrate.
286	So dealing with any explosive substance.	Ditto	...	Ditto	...	Ditto	...	Ditto	...	Ditto	...	Ditto.
287	So dealing with any machinery.	Shall not arrest without warrant.	...	Ditto	...	Ditto	...	Ditto	...	Ditto	...	Presidency Magistrate of the first or second class.
288	A person omitting to guard against probable danger to human life by the fall of any building over which he has a right entitling him to pull it down or repair it.	Ditto	...	Ditto	...	Ditto	...	Ditto	...	Ditto	...	Ditto.
289	A person omitting to take order with any animal in his possession, so as to guard against danger to human life or of grievous hurt, from such animal.	May arrest without warrant.	...	Ditto	...	Ditto	...	Ditto	...	Ditto	...	Any Magistrate.
290	Committing a public nuisance	Shall not arrest without warrant.	...	Ditto	...	Ditto	...	Ditto	...	Fine of 200 rupees	...	Ditto.
291	Continuance of nuisance after injunction to discontinue.	May arrest without warrant.	...	Ditto	...	Ditto	...	Ditto	...	Simple imprisonment for 6 months, or fine, or both.	...	Presidency Magistrate or Magistrate of the first or second class.
292	Sale, &c., of obscene books, &c.	Ditto	...	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 3 months, or fine or both.	...	Ditto.

SCHEDULE II—continued.

CHAPTER XIV.—OFFENCES AFFECTING THE PUBLIC HEALTH, SAFETY, CONVENIENCE, DECENCY AND MORALS—concluded.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
293	Having in possession obscene books, &c., for sale or exhibition.	May arrest without warrant.	Warrant ...	Bailable ...	Not compoundable.	Imprisonment of either description for 3 months, or fine or both.	Presidency Magistrate or Magistrate of the first or second class.
294	Obscene songs ...	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Ditto	Ditto.
294A	Keeping a lottery office ...	Shall not arrest without warrant.	Summons ...	Ditto ...	Ditto ...	Imprisonment of either description for 6 months, or fine, or both.	Any Magistrate.
	Publishing proposals relating to lotteries.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Fine of 1,000 rupees ...	Ditto.

CHAPTER XV.—OFFENCES RELATING TO RELIGION.

295	296	297
Destroying, damaging or defiling a place of worship or sacred object with intent to insult the religion of any class of persons.	Causing a disturbance to an assembly engaged in religious worship.	Trespassing in place of worship or sepulture, disturbing funeral, with intention to wound the feelings or to insult the religion of any person, or offering indignity to a human corpse.
May arrest without warrant.	Ditto ...	Ditto ...
Summons ...	Ditto ...	Ditto ...
Bailable ...	Ditto ...	Ditto ...
Not compoundable.	Ditto ...	Ditto ...
Imprisonment of either description for 2 years, or fine, or both.	Imprisonment of either description for 1 year, or fine, or both.	...
Presidency Magistrate or Magistrate of the first or second class.	Ditto.	Ditto.

398 Uttering any word or making any sound in the hearing, or making any gesture, or placing any object in the sight, of any person, with intention to wound his religious feeling.

Shall not arrest without warrant.

Ditto ...

Ditto

Compo und -
able.

Ditto

...

Ditto.

CHAPTER XVI.—OFFENCES AFFECTING THE HUMAN BODY.

Of Offences affecting Life.

302	Murder	...	...	...	Warrant	May arrest without warrant.	...	Not bailable.	Not compoundable.	Death, or transportation for life, and fine.	Court of Session.
303	Murder by a person under sentence of transportation for life.	...	...	...	Ditto ...	Ditto ...	...	Ditto	Ditto	Death ...	Ditto.
304	Culpable homicide not amounting to murder, if act by which the death is caused is done with intention of causing death, etc. If act is done with knowledge that it is likely to cause death, but without any intention to cause death, etc.	...	...	...	Ditto ...	Ditto ...	...	Ditto	Ditto	Transportation for life, or imprisonment of either description for 10 years, and fine.	Ditto.
304A	Causing death by rash or negligent act.	...	...	...	Ditto ...	Ditto ...	...	Bailable	Ditto	Imprisonment of either description for 10 years, or fine, or both.	Court of Session.
305	Abetment of suicide committed by a child, or insane or delirious person or an idiot, or a person intoxicated.	...	...	...	Ditto ...	Ditto ...	...	Not bailable	Ditto	Imprisonment of either description for 2 years, or fine or both.	Court of Session, Presidency Magistrate or Magistrate of the first class.
306	Abetting the commission of suicide.	...	...	...	Ditto ...	Ditto ...	...	Ditto	Ditto	Death, or transportation for life, or imprisonment for 10 years, and fine.	Court of Session.
307	Attempt to murder If such act cause hurt to any person.	...	...	...	Ditto ...	Ditto ...	...	Ditto	Ditto	Imprisonment of either description for 10 years and fine.	Ditto.
		...	...	...	Ditto ...	Ditto ...	...	Ditto	Ditto	Transportation for life, or as above.	Ditto.

SCHEDULE II—continued.

CHAPTER XVI.—OFFENCES AFFECTING THE HUMAN BODY—continued.

Of Offences affecting Life—concluded.

1	2	3	4	5	6	7	8
Section	Offence.	Whether the police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
307— <i>confd.</i> 308	Attempt by life-convict to murder, if hurt is caused. Attempt to commit culpable homicide.	May arrest without warrant. Ditto	Warrant ... Ditto ...	Not bailable ... Bailable ...	Not compoundable. Ditto ...	Death, or as above. Imprisonment of either description for 3 years, or fine, or both.	Court of Session. Ditto.
309	If such act cause hurt to any person. Attempt to commit suicide	Ditto ... Ditto ...	Ditto ... Ditto ...	Ditto ... Ditto ...	Ditto ... Ditto ...	Imprisonment of either description for 7 years, or fine, or both. Simple imprisonment for 1 year, or fine, or both.	Ditto. Presidency Magistrate or Magistrate of the first or second class.
311	Being a thug	Ditto	Ditto	Not bailable	Ditto	Transportation for life and fine.	Court of Session.
<i>Of the Causing of Miscarriage ; of Injuries to Unborn Children ; and of the Concealment of Births.</i>							
312	Causing miscarriage	Shall not arrest without warrant	Warrant	Bailable	Not compoundable.	Imprisonment of either description for 3 years, or fine, or both.	Court of Session.
	If the woman be quick with child.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years and fine.	Ditto.
313	Causing miscarriage without woman's consent.	Ditto	Ditto	Not bailable	Ditto	Transportation for life, or imprisonment of either description for 10 years, and fine.	Ditto.

314	Death caused by an act done with intent to cause miscarriage. If act done without woman's consent	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 10 years and fine.	Ditto.
315	Act done with intent to prevent a child being born alive, or to cause it to die after its birth.	Ditto	...	Ditto	...	Ditto	...	Transportation for life, or as above.	Ditto.
316	Causing death of a quick unborn child by an act amounting to culpable homicide.	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 10 years, or fine, or both.	Ditto.
317	Exposure of a child under 12 years of age by parent or person having care of it with intention of wholly abandoning it.	May arrest without warrant.	...	Ditto	...	Ditto	...	Imprisonment of either description for 7 years, or fine, or both.	Ditto.
318	Concealment of birth by secret disposal of dead body.	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 2 years, or fine, or both.	Court of Session, Presidency Magistrate, or Magistrate of the first or second class.

Of Hurt.

323	Voluntarily causing hurt ...	Shall not arrest without warrant	...	Bailable	...	Compoundable	...	Imprisonment of either description for 1 year, or fine of 1,000 rupees, or both.	Any Magistrate.
324	Voluntarily causing hurt by dangerous weapons or means.	May arrest without warrant.	...	Ditto	...	Compoundable when permission is given by the Court before which a prosecution is pending.	...	Imprisonment of either description for 3 years, or fine, or both.	Court of Session, Presidency Magistrate, or Magistrate of the first or second class.
325	Voluntarily causing grievous hurt.	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 7 years and fine.	Ditto.

SCHEDULE II—continued.

CHAPTER XVI.—OFFENCES AFFECTING THE HUMAN BODY—continued.

Of Offences affecting Life—concluded.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
307— <i>concl.</i> 308	Attempt by life-convict to murder, if hurt is caused. Attempt to commit culpable homicide.	May arrest without warrant. ... Ditto ...	Warrant ... Ditto ...	Not bailable ... Bailable ...	Not compoundable. Ditto ...	Death, or as above. Imprisonment of either description for 3 years, or fine, or both. Imprisonment of either description for 7 years, or fine, or both.	Court of Session. Ditto. Ditto.
309	If such act cause hurt to any person. Attempt to commit suicide	Ditto ... Ditto ...	Ditto ... Ditto ...	Ditto ... Ditto ...	Ditto ... Ditto ...	Simple imprisonment for 1 year, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class. Court of Session.
311	Being a thug	Ditto ...	Ditto ...	Not bailable	Ditto ...	Transportation for life and fine.	Court of Session.
<i>Of the Causing of Miscarriage ; of Injuries to Unborn Children ; of the Exposure of Infants ; and of the Concealment of Births.</i>							
312	Causing miscarriage	Shall not arrest without warrant	Warrant	Bailable	Not compoundable.	Imprisonment of either description for 3 years, or fine, or both.	Court of Session.
	If the woman be quick with child.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years and fine.	Ditto.
313	Causing miscarriage without woman's consent.	Ditto	Ditto	Not bailable	Ditto	Transportation for life, or imprisonment of either description for 10 years, and fine.	Ditto.

314	Death caused by an act done with intent to cause miscarriage. If act done without woman's consent	Ditto	...	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 10 years and fine.	Ditto.
315	Act done with intent to prevent a child being born alive, or to cause it to die after its birth.	Ditto	...	Ditto	...	Ditto	...	Ditto	...	Transportation for life, or as above.	Ditto.
316	Causing death of a quick unborn child by an act amounting to culpable homicide.	Ditto	...	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 10 years, or fine, or both.	Ditto.
317	Exposure of a child under 12 years of age by parent or person having care of it with intention of wholly abandoning it.	May arrest without warrant.	...	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 7 years, or fine, or both.	Ditto.
318	Concealment of birth by secret disposal of dead body.	Ditto	...	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 2 years, or fine, or both.	Court of Session, Presidency Magistrate, or Magistrate of the first or second class.

Of Hurt.

323	Voluntarily causing hurt ...	Shall not arrest without warrant	...	Bailable	...	Compoundable	...	Imprisonment of either description for 1 year, or fine of 1,000 rupees, or both.	Any Magistrate.
324	Voluntarily causing hurt by dangerous weapons or means.	May arrest without warrant.	...	Ditto	...	Compoundable when permission is given by the Court before which a prosecution is pending.	...	Imprisonment of either description for 3 years, or fine, or both.	Court of Session, Presidency Magistrate, or Magistrate of the first or second class.
325	Voluntarily causing grievous hurt.	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 7 years and fine.	Ditto.

SCHEDULE II—continued.

CHAPTER XVI.—OFFENCES AFFECTING THE HUMAN BODY—continued.

Of the Causing of Miscarriage; of Injuries to Unborn Children; of the Exposure of Infants; and of the Concealment of Births—concl.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
326	Voluntarily causing grievous hurt by dangerous weapons or means.	May arrest without warrant.	Summons ...	Not bailable...	Not compoundable.	Transportation for life, or imprisonment of either description for 10 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
327	Voluntarily causing hurt to extort property or a valuable security, or to constrain to do anything which is illegal or which may facilitate the commission of an offence.	Ditto ...	Warrant ...	Ditto ...	Ditto ...	Imprisonment of either description for 10 years and fine.	Court of Session.
328	Administering stupefying drug with intent to cause hurt, etc.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Ditto.
329	Voluntarily causing grievous hurt to extort property or a valuable security, or to constrain to do anything which is illegal, or which may facilitate the commission of an offence.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Transportation for life, or imprisonment of either description for 10 years and fine.	Ditto.
330	Voluntarily causing hurt to extort confession or information, or to compel restoration of property, etc.	Ditto ...	Ditto ...	Bailable ...	Ditto ...	Imprisonment of either description for 7 years and fine.	Ditto.

331	Voluntarily causing grievous hurt to extort confession or information, or to compel restoration of property, etc.	Ditto	...	Ditto	...	Not bailable.	Ditto	...	Imprisonment of either description for 10 years and fine.	Ditto.
332	Voluntarily causing hurt to deter public servant from his duty.	Ditto	...	Ditto	...	Bailable	Ditto	...	Imprisonment of either description for 3 years or fine, or both	Court of Session, Presidency Magistrate or Magistrate of the first class.
333	Voluntarily causing grievous hurt to deter public servant from his duty.	Ditto	...	Ditto	...	Not bailable.	Ditto	...	Imprisonment of either description for 10 years and fine.	Court of Session.
334	Voluntarily causing hurt on grave and sudden provocation, not intending to hurt any other than the person who gave the provocation.	Shall not arrest without warrant.	...	Summons	...	Bailable	Compoundable.	...	Imprisonment of either description for 1 month, or fine of 500 rupees, or both.	Any Magistrate.
335	Causing grievous hurt on grave and sudden provocation, not intending to hurt any other than the person who gave the provocation.	May arrest without warrant	...	Ditto	...	Ditto	Compoundable when permission is given by the Court before which a prosecution is pending.	...	Imprisonment of either description for 4 years, or fine of 2,000 rupees, or both.	Court of Session, Presidency Magistrate or Magistrate of the first or second class.
336	Doing any act which endangers human life or the personal safety of others.	Ditto	...	Ditto	...	Ditto	Not compoundable.	...	Imprisonment of either description for 3 months, or fine of 250 rupees, or both.	Any Magistrate.
337	Causing hurt by an act which endangers human life, etc.	Ditto	...	Ditto	...	Ditto	Compoundable when permission is given by the Court before which a prosecution is pending.	...	Imprisonment of either description for 6 months, or fine of 500 rupees, or both.	Presidency Magistrate or Magistrate of the first or second class.
338	Causing grievous hurt by an act which endangers human life, etc.	Ditto	...	Ditto	...	Ditto	Ditto	...	Imprisonment of either description for 2 years, or fine of 1,000 rupees, or both.	Ditto.

SCHEDULE II—continued.
CHAPTER XVI.—OFFENCES AFFECTING THE HUMAN BODY—continued.
Of Hurt—concluded.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
<i>Of Wrongful Restraint and Wrongful Confinement.</i>							
341	Wrongfully restraining any person.	May arrest without warrant.	Summons ...	Bailable ...	Compoundable.	Simple imprisonment for 1 month, or fine of 500 rupees or both.	Any Magistrate.
342	Wrongfully confining any person.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Imprisonment of either description for 1 year; or fine of 1,000 rupees or both.	Presidency Magistrate or Magistrate of the first or second class.
343	Wrongfully confining for three or more days.	Ditto ...	Ditto ...	Ditto ...	Not compoundable.	Imprisonment of either description for 2 years, or fine, or both.	Ditto.
344	Wrongfully confined for ten or more days.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Imprisonment of either description for 3 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first or second class.
345	Keeping any person in wrongful confinement, knowing that a writ has been issued for his liberation.	Shall not arrest without warrant.	Ditto ...	Ditto ...	Ditto ...	Imprisonment of either description for 2 years, in addition to imprisonment under any other section.	Ditto.
346	Wrongful confinement in secret.	May arrest without warrant.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Ditto.

347	Wrongful confinement for the purpose of extorting property, or constraining to an illegal act, etc.	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 3 years and fine.	Ditto.
348	Wrongful confinement for the purpose of extorting confession or information, or of compelling restoration of property, etc.	Ditto	...	Ditto	...	Ditto	...	Ditto	Court of Session, Presidency Magistrate or Magistrate of the first class.

Of Criminal Force and Assault.

352	Assault or use of criminal force otherwise than on grave provocation.	Shall not arrest without warrant.	...	Bailable	...	Compoundable.	...	Imprisonment of either description for 3 months, or fine of 500 rupees, or both.	Any Magistrate.
353	Assault or use of criminal force to deter a public servant from discharge of his duty.	May arrest without warrant.	...	Ditto	...	Not compoundable.	...	Imprisonment of either description for 2 years, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
354	Assault or use of criminal force to a woman with intent to outrage her modesty.	Ditto	...	Ditto	...	Ditto	...	Ditto	Ditto.
355	Assault or criminal force with intent to dishonour a person, otherwise than on grave and sudden provocation.	Shall not arrest without warrant.	...	Ditto	...	Compoundable.	...	Ditto	Ditto.
356	Assault or criminal force in attempt to commit theft of property worn or carried by a person.	May arrest without warrant.	...	Not bailable	...	Not compoundable.	...	Ditto	Any Magistrate.
357	Assault or use of criminal force in attempt wrongfully to confine a person.	Ditto	...	Bailable	...	Ditto	...	Imprisonment of either description for 1 year, or fine of 1,000 rupees, or both.	Ditto.
358	Assault or use of criminal force on grave and sudden provocation.	Shall not arrest without warrant.	...	Ditto	...	Compoundable.	...	Simple imprisonment for 1 month, or fine of 200 rupees, or both.	Ditto.

SCHEDULE II—continued.

CHAPTER XVI.—OFFENCES AFFECTING THE HUMAN BODY—continued.

Criminal Force and Assault—concluded.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.

Of Kidnapping, Abduction, Slavery and Forced Labour.

363	Kidnapping	May arrest without warrant.	Warrant ...	Not bailable.	Not compoundable.	Imprisonment of either description for 7 years and fine.	Court of Session, Presidency Magistrate or the first class.
364	Kidnapping or abducting in order to murder.	Ditto	Ditto	Ditto	Ditto	Transportation for life or rigorous imprisonment for 10 years and fine.	Court of Session.
365	Kidnapping or abducting with intent secretly and wrongfully to confine a person.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years and fine.	Court of Session, Presidency Magistrate or the first class.
366	Kidnapping or abducting a woman to compel her marriage or to cause her defilement, &c.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 10 years and fine.	Court of Session.
367	Kidnapping or abducting in order to subject a person to grievous hurt, slavery, etc.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto.
368	Concealing or keeping in confinement a kidnapped person.	Ditto	Ditto	Ditto	Ditto	Punishment for kidnapping or abduction.	Ditto.

369	Kidnapping or abducting a child with intent to take property from the person of such child.	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 7 years and fine.	Court of Session, Presidency or Magistrate of the first class.
370	Baying or disposing of any person as a slave.	Shall not arrest without warrant.	Ditto	...	Bailable	...	Ditto	Ditto	Ditto.
371	Habitual dealing in slaves.	May arrest without warrant.	Ditto	...	Not bailable...	...	Ditto	Transportation for life, or imprisonment of either description for 10 years and fine.	Ditto.
372	Selling or letting to hire a minor for purposes of prostitution, &c.	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 10 years and fine.	Court of Session, Presidency or Magistrate of the first class.
373	Baying or obtaining possession of a minor for the same purposes.	Ditto	...	Ditto	...	Ditto	...	Ditto	Ditto.
374	Unlawful compulsory labour	Ditto	...	Ditto	...	Bailable	...	Imprisonment of either description for 1 year, or fine, or both.	Any Magistrate.

Of Rape.

375	Rape— If the sexual intercourse was by a man with his own wife.	Shall not arrest without warrant.	Summons	...	Bailable	...	Not compoundable.	Transportation for life, or imprisonment of either description for 10 years, and fine.	Court of Session.
	In any other case	May arrest without warrant.	Warrant	...	Not bailable...	...	Ditto	Ditto	Ditto.

Of Unnatural Offences.

377	Unnatural offences	May arrest without warrant.	Warrant	...	Not bailable	...	Not compoundable.	Transportation for life, or imprisonment of either description for 10 years and fine.	Court of Session, Presidency or Magistrate of the first class.
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SCHEDULE II—continued.

CHAPTER XVI.—OFFENCES AFFECTING THE HUMAN BODY—concluded.

Of Kidnapping, Abduction, Slavery and Forced Labour—concluded.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.

CHAPTER XVII.—OFFENCES AGAINST PROPERTY.

Of Theft.

	Thrift	May arrest without warrant.	Warrant	Not bailable...	Not compoundable.	Imprisonment of either description for 3 years, or fine, or both.	Any Magistrate.
379	...	...	...	...	...	...	...
380	Theft in a building, tent or vessel.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years and fine.	Ditto
381	Theft by clerk or servant of property in possession of master or employer.	Ditto	Ditto	Ditto	Ditto	Ditto	Court of Session, Presidency Magistrate or Magistrate of the first or second class.
382	Theft, preparation having been made for causing death, or hurt, or restraint or fear of death, or of hurt or of restraint, in order to the committing of such theft or to retiring after committing it, or to retaining property taken by it.	Ditto	Ditto	Ditto	Ditto	Rigorous imprisonment for 10 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.

Of Extortion.

384	Extortion	Shall not arrest without warrant	Warrant		Bailable	Not poundable.	Imprisonment of either description for 3 years, or fine or both.	Court of Session, Presidency Magistrate or Magistrate of the first or second class.
385	Putting or attempting to put in fear of injury, in order to commit extortion.	Ditto	Ditto	...	Ditto	Ditto	Imprisonment of either description for 2 years or fine or both.	Ditto.
386	Extortion by putting a person in fear of death or grievous hurt.	Ditto	Ditto	...	Not bailable	Ditto	Imprisonment of either description for 10 years and fine.	Court of Session.
387	Putting or attempting to put a person in fear of death or grievous hurt in order to commit extortion.	Ditto	Ditto	...	Ditto	Ditto	Imprisonment of either description for 7 years and fine.	Ditto.
388	Extortion by threat of accusation of an offence punishable with death, transportation for life, or imprisonment for 10 years if the offence threatened be an unnatural offence.	Ditto	Ditto	...	Bailable	Ditto	Imprisonment of either description for 10 years and fine.	Ditto.
389	Putting a person in fear of accusation of offence punishable with death, transportation for life, or with imprisonment for 10 years, in order to commit extortion.	Ditto	Ditto	...	Ditto	Ditto	Transportation for life	Ditto.
	If the offence be an unnatural offence.	Ditto	Ditto	...	Ditto	Ditto	Imprisonment of either description for 10 years and fine.	Ditto.
		Ditto	Ditto	...	Ditto	Ditto	Transportation for life	Ditto.

Of Robbery and Dacoity.

392	Robbery	May arrest without warrant.	Warrant		Not bailable...	Not poundable.	Rigorous imprisonment for 10 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
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SCHEDULE II—continued.
CHAPTER XVII.—OFFENCES AGAINST PROPERTY—continued.
Of Extortion—concluded.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
332— confd.	If committed on the highway between sunset and sunrise.	May arrest without warrant.	Warrant ...	Not bailable ..	Not compoundable.	Rigorous imprisonment for 14 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
393	Attempt to commit robbery	Ditto ..	Ditto ...	Ditto ..	Ditto	Rigorous imprisonment for 7 years and fine.	Ditto.
394	Persons voluntarily causing hurt in committing or attempting to commit robbery, or any other person jointly concerned in such robbery.	Ditto ..	Ditto ...	Ditto ..	Ditto	Rigorous imprisonment for 7 years and fine. or Transportation for life or rigorous imprisonment for 10 years and fine.	Ditto.
395	Dacoity	Ditto ..	Ditto ...	Ditto ..	Ditto	Ditto	Court of Session.
396	Murder in dacoity	Ditto ..	Ditto ...	Ditto ..	Ditto	Death, transportation for life or rigorous imprisonment for 10 years and fine.	Ditto.
397	Robbery or dacoity, with attempt to cause death or grievous hurt.	Ditto ..	Ditto ...	Ditto ..	Ditto	Rigorous imprisonment for not less than 7 years.	Ditto.
398	Attempt to commit robbery or dacoity when armed with deadly weapon.	Ditto ..	Ditto ...	Ditto ..	Ditto	Ditto	Ditto.
399	Making preparation to commit dacoity.	Ditto ..	Ditto ...	Ditto ..	Ditto	Rigorous imprisonment for 10 years and fine.	Ditto.
400	Belonging to a gang of persons associated for the purpose of habitually committing dacoity.	Ditto ..	Ditto ...	Ditto ..	Ditto	Rigorous imprisonment for 10 years and fine.	Ditto.

401	Belonging to a wandering gang of persons associated for the purpose of habitually committing thefts.	Ditto	...	Ditto	...	Ditto	...	Rigorous imprisonment for 7 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
402	Being one of five or more persons assembled for the purpose of committing dacoity.	Ditto	...	Ditto	...	Ditto	...	Ditto	Court of Session.

Of Criminal Misappropriation of Property.

403	Dishonest misappropriation of moveable property, or converting it to one's own use.	Shall not arrest without warrant.	...	Bailable	...	Not compoundable.	...	Imprisonment of either description for 2 years, or fine, or both.	Any Magistrate.
404	Dishonest misappropriation of property, knowing that it was in possession of a deceased person at his death, and that it has not since been in the possession of any person legally entitled to it.	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 3 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first or second class.
405	If by clerk or person employed by deceased.	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 7 years, and fine.	Ditto.

Of Criminal Breach of Trust.

406	Criminal breach of trust ...	May arrest without warrant.	...	Warrant	...	Not bailable...	...	Imprisonment of either description for 3 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first or second class.
407	Criminal breach of trust by a carrier, wharfinger, &c.	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 7 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.

SCHEDULE II—continued.

CHAPTER XVII.—OFFENCES AGAINST PROPERTY—continued.

Of Criminal Misappropriation of Property—continued.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
408	Criminal breach of trust by a clerk or servant.	May arrest without warrant.	Warrant ...	Not bailable ...	Not compoundable.	Imprisonment of either description for 7 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first or second class.
409	Criminal breach of trust by public servant or by banker, merchant or agent, &c.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Transportation for life or imprisonment of either description for 10 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.

Of the Receiving of Stolen Property.

411	Dishonestly receiving stolen property, knowing it to be stolen.	May arrest without warrant.	Warrant ...	Not bailable ...	Not compoundable.	Imprisonment of either description for 3 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first or second class.
412	Dishonestly receiving stolen property, knowing that it was obtained by dacoity.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Transportation for life, or rigorous imprisonment for 10 years and fine.	Court of Session.
413	Habitually dealing in stolen property	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Transportation for life, or imprisonment of either description for 10 years and fine.	Ditto.

414	Assisting in concealment or disposal of stolen property, knowing it to be stolen.	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 3 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first or second class.
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Of Cheating.

417	Cheating	Shall not arrest without warrant.	Warrant	...	Bailable	...	Not com- poundable.	Imprisonment of either description for 1 year, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
418	Cheating a person whose interest the offender was bound, either by law or by legal contract, to protect.	Ditto	Ditto	...	Ditto	...	Ditto	Imprisonment of either description for 3 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first or second class.
419	Cheating by personation ...	May arrest without warrant.	Ditto	...	Ditto	...	Ditto	Ditto	Ditto.
420	Cheating and thereby dishonestly inducing delivery of property, or he making alteration or destruction of a valuable security.	Ditto	Ditto	...	Ditto	...	Ditto	Imprisonment of either description for 7 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.

Of Fraudulent Deeds and Disposition of Property.

421	Fraudulent removal or concealment of property, &c., to prevent distribution among creditors.	Shall not arrest without warrant.	Warrant	...	Bailable	...	Not com- poundable.	Imprisonment of either description for 2 years, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
422	Fraudulently preventing from being made available for his creditors a debt or demand due to the offender.	Ditto	Ditto	...	Ditto	...	Ditto	Ditto	Ditto.

SCHEDULE II—continued.
CHAPTER XVII.—OFFENCES AGAINST PROPERTY—continued.
Of Cheating—concluded.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
423	Fraudulent execution of deed of transfer containing a false statement of consideration.	Shall not arrest without warrant.	Warrant ...	Bailable ...	Not compoundable.	Imprisonment of either description for 2 years, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
424	Fraudulent removal or concealment of property, of himself or any other person, or assisting in the doing thereof, or dishonestly retaining, any demand or claim to which he is entitled.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Ditto.

Of Mischief.

425	Mischief	Shall not arrest without warrant.	Summons ...	Bailable ...	Compoundable when the only loss or damage caused is loss or damage to a private person. ...	Imprisonment of either description for 3 months, or fine, or both.	Any Magistrate.
427	Mischief, and thereby causing damage to the amount of 50 rupees or upwards.	Ditto ...	Warrant ...	Ditto ...	Ditto ...	Imprisonment of either description for 2 years, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.

428	Mischief by killing poisoning, maiming or rendering useless any animal of the value of 10 rupees or upwards.	Ditto	...	Ditto	...	Not o o m - poundable.	Ditto	...	Ditto.
429	Mischief by killing, poisoning, maiming or rendering useless any elephant, camel, horse, &c., whatever may be its value, or any other animal of the value of 50 rupees or upwards.	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 5 years or fine, or both.	Court of Session, Presidency Magistrate, or Magistrate of the first or second class.
430	Mischief by causing diminution of supply of water for agricultural purposes, &c.	Ditto	...	Ditto	...	Ditto	...	Ditto	Ditto.
431	Mischief by injury to public road, bridge, navigable river, or navigable channel, and rendering it impassable or less safe for travelling or conveying property.	Ditto	...	Ditto	...	Ditto	...	Ditto	Ditto.
432	Mischief by causing inundation or obstruction to public drainage, attended with damage.	Ditto	...	Ditto	...	Ditto	...	Ditto	Ditto.
433	Mischief by destroying or moving or rendering less useful a light-house or sea-mark, or by exhibiting false lights.	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 7 years, or fine, or both.	Court of Session.
434	Mischief by destroying or moving, &c., a land-mark fixed by public authority.	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 1 year, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.

SCHEDULE II—continued.

CHAPTER XVII.—OFFENCES AGAINST PROPERTY—continued.

Of Mischief—concluded.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
435	Mischief by fire or explosive substance with intent to cause damage to amount of 100 rupees or upwards, or, in case of agricultural produce, 10 rupees or upwards.	May arrest without warrant.	Warrant ...	Bailable ...	Not compoundable.	Imprisonment of either description for 7 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
436	Mischief by fire or explosive substance with intent to destroy a house, &c.	Ditto ...	Ditto ...	Not bailable...	Ditto ...	Transportation for life or imprisonment of either description for 10 years and fine.	Court of Session.
437	Mischief with intent to destroy or make unsafe a decked vessel or a vessel of 20 tons burden.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Imprisonment of either description for 10 years and fine.	Ditto.
438	Themischief described in the last section when committed by fire or any explosive substance.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Transportation for life or imprisonment of either description for 10 years and fine.	Ditto.
439	Running vessel ashore with intent to commit theft, &c.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Imprisonment of either description for 10 years and fine.	Ditto.
440	Mischief committed after preparation made for causing death, or hurt, &c.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Imprisonment of either description for 5 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.

Of Criminal Trespass.

447	Criminal trespass	May arrest without warrant.	Summons	Bailable	Compoundable.	Imprisonment of either description for 3 months, or fine of 500 rupees, or both	Any Magistrate.
448	House-trespass	Ditto	Warrant	Ditto	Ditto	Imprisonment of either description for 1 year, or fine of 1,000 rupees, or both.	Ditto.
449	House-trespass in order to the commission of an offence punishable with death.	Ditto	Ditto	Not bailable	Not compoundable.	Transportation for life, or rigorous imprisonment for 10 years, and fine.	Court of Session.
450	House-trespass in order to the commission of an offence punishable with transportation for life.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 10 years and fine.	Ditto.
451	House-trespass in order to the commission of an offence punishable with imprisonment. If the offence is theft	Ditto	Ditto	Bailable	Ditto	Imprisonment of either description for 2 years and fine.	Any Magistrate.
452	House-trespass, having made preparation for causing hurt, assault, &c.	Ditto	Ditto	Not bailable	Ditto	Imprisonment of either description for 7 years and fine.	Court of Session, Presidency Magistrate, or Magistrate of the first or second class.
453	Lurking house-trespass or house-breaking.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 2 years and fine.	Ditto.
454	Lurking house-trespass or house-breaking in order to the commission of an offence punishable with imprisonment.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years and fine.	Presidency Magistrate, or Magistrate of the first or second class. Court of Session, Presidency Magistrate, or Magistrate of the first or second class.

SCHEDULE II—continued.

CHAPTER XVII.—OFFENCES AGAINST PROPERTY—continued.

Of Criminal Trespass—concluded.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
454— <i>confd.</i>	If the offence is theft ...	May arrest without warrant.	Warrant ...	Not bailable...	Not compoundable.	Imprisonment of either description for 10 years and fine.	Court of Session, Presidency Magistrate, or Magistrate of the first or second class.
455	Lurking house-trespass or house-breaking after preparation made for causing hurt, assault, &c.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Ditto	Court of Session, Presidency Magistrate or Magistrate of the first class.
456	Lurking house-trespass or house-breaking by night.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Imprisonment of either description for 3 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
457	Lurking house-trespass or house-breaking by night in order to the commission of an offence punishable with imprisonment. If the offence is theft ...	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Imprisonment of either description for 5 years and fine.	Ditto.
		Ditto ...	Ditto ...	Ditto ...	Ditto ...	Imprisonment of either description for 14 years and fine.	Ditto.

458	Lurking house-trespass or house-breaking by night, after preparation made for causing hurt, &c.	Ditto	...	Ditto	...	Ditto	...	Ditto	...	Ditto	...	Court of Session, Presidency Magistrate, or Magistrate of the first class.
459	Grievous hurt caused whilst committing lurking house-trespass or house-breaking	Ditto	...	Ditto	...	Ditto	...	Ditto	...	Transportation for life, or imprisonment for 10 years and fine.	...	Court of Session.
460	Death or grievous hurt caused by one of several persons jointly concerned in housebreaking by night, &c.	Ditto	...	Ditto	...	Ditto	...	Ditto	...	Ditto	...	Ditto.
461	Dishonestly breaking open or unfastening any closed receptacle containing or supposed to contain property.	Ditto	...	Ditto	...	Bailable	...	Ditto	...	Imprisonment of either description for 2 years, or fine, or both.	...	Presidency Magistrate, or Magistrate of the first or second class.
462	Being entrusted with any closed receptacle containing or supposed to contain any property, and fraudulently opening the same.	Ditto	...	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 3 years, or fine, or both.	...	Court of Session, Presidency Magistrate, or Magistrate of the first or second class.

CHAPTER XVII.—OFFENCES RELATING TO DOCUMENTS AND TO TRADE OR PROPERTY MARKS.

465	Forgery	...	Shall not arrest without warrant.	Warrant	...	Bailable	...	Not compoundable.	...	Imprisonment of either description for 2 years or fine, or both.	...	Court of Session, Presidency Magistrate, or Magistrate of the first class.
466	Forgery of a record of a Court of Justice, or of a Register of Births, &c., kept by a public servant.	Ditto	...	Ditto	...	Not bailable	...	Ditto	...	Imprisonment of either description for 7 years and fine.	...	Court of Session.
467	Forgery of a valuable security, will, or authority to make or transfer any valuable security, or to receive any money, &c.	Ditto	...	Ditto	...	Ditto	...	Ditto	...	Transportation for life, or imprisonment of either description for 10 years and fine.	...	Ditto.

SCHEDULE II.—continued.

CHAPTER XVIII.—OFFENCES RELATING TO DOCUMENTS AND TO TRADE OR PROPERTY MARKS—continued.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
467	When the valuable security is a promissory note of the Government of India.	May arrest without warrant.	Warrant ...	Not bailable ...	Not compoundable.	Transportation, for life, or imprisonment of either description for 10 years and fine.	Court of Session.
468	Forgery for the purpose of cheating.	Shall not arrest without warrant.	Ditto ...	Ditto ...	Ditto ...	Imprisonment of either description for 7 years and fine.	Court of Session, Presidency Magistrate, or Magistrate of the first class.
469	Forgery for the purpose of harming the reputation of any person, or knowing that it is likely to be used for that purpose.	Ditto ...	Ditto ...	Bailable ...	Ditto ...	Imprisonment of either description for 3 years and fine.	Ditto.
471	Using as genuine a forged document which is known to be forged.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Punishment for forgery of such document.	Same Court as that by which the forgery is triable.
472	When the forged document is a promissory note of the Government of India.	May arrest without warrant.	Ditto ...	Ditto ...	Ditto ...	Ditto	Court of Session.
	Making or counterfeiting a seal, plate, &c., with intent to commit a forgery punishable under section 467 of the Indian Penal Code, or possessing with like intent any such seal, plate, &c., knowing the same to be counterfeit.	Shall not arrest without warrant.	Ditto ...	Ditto ...	Ditto ...	Transportation for life, imprisonment of either description for 7 years and fine.	Ditto.

473	Making or counterfeiting a seal, plate, &c., with intent to commit a forgery punishable otherwise than under Section 467 of the Indian Penal Code, or possessing with like intent any such seal, plate, &c., knowing the same to be counterfeit.	Ditto	...	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 7 years and fine.	Ditto.
474	Having possession of a document, knowing it to be forged, with intent to use it as genuine; if the document is one of the description mentioned in section 466 of the Indian Penal Code.	Ditto	..	Ditto	...	Ditto	...	Ditto	...	Ditto	Ditto.
475	If the document is one of the description mentioned in section 467 of the Indian Penal Code.	Ditto	...	Ditto	...	Ditto	...	Ditto	...	Transportation for life, or imprisonment of either description for 7 years and fine.	Ditto.
	Counterfeiting a device or mark used for authenticating documents described in section 467 of the Indian Penal Code, or possessing counterfeit marked material.	Ditto	...	Ditto	...	Ditto	...	Ditto	...	Ditto	Ditto.
476	Counterfeiting a device or mark used for authenticating documents other than those described in section 467 of the Indian Penal Code, or possessing counterfeit marked material.	Ditto	...	Not bailable...	...	Ditto	...	Ditto	...	Imprisonment of either description for 7 years and fine.	Ditto.
477	Fraudulently destroying or defacing or attempting to destroy or deface, or secreting, a will, etc.	Ditto	...	Ditto	...	Ditto	...	Ditto	...	Transportation for life, or imprisonment of either description for 7 years and fine.	Ditto.
477 A	Falsification of accounts.	Ditto	...	Ditto	...	Ditto	...	Ditto	...	Ditto	Ditto.

SCHEDULE II—continued.

CHAPTER XVIII.—OFFENCES RELATING TO DOCUMENTS AND TO TRADE OR PROPERTY MARKS—concluded.

Of Trade and Property Marks.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
482	Using a false trade or property mark with intent to deceive or injure any person.	Shall not arrest without warrant.	Warrant ...	Bailable ...	Not compoundable.	Imprisonment of either description for 1 year, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
483	Counterfeiting a trade or property mark used by another, with intent to cause damage or injury.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Imprisonment of either description for 2 years, or fine, or both.	Ditto.
484	Counterfeiting a property-mark used by a public servant, or any mark used by him to denote the manufacture, quality, &c., of any property.	Ditto ...	Summons ...	Ditto ...	Ditto ...	Imprisonment of either description for 3 years and fine.	Court of Session, Presidency, Magistrate or Magistrate of the first class.
485	Fraudulently making or having possession of any die, plate or oth. instrument for counterfeiting any public or private property or trade-mark.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Imprisonment of either description for 3 years, or fine, or both.	Ditto.
486	Knowingly selling goods marked with a counterfeit property or trade-mark.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Imprisonment of either description for 1 year, or fine, or both.	Presidency Magistrate, or Magistrate of the first or second class.

487	Fraudulently making a false mark upon any package or receptacle containing goods, with intent to cause it to be believed that it contains goods which it does not contain, etc.	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 8 years, or fine, or both.	Court of Session, Presidency Magistrate, or Magistrate of the first or second class. Ditto.
488	Making use of any such false mark.	Ditto	...	Ditto	...	Ditto	...	Ditto	Ditto.
489	Removing, destroying or defacing any property-mark with intent to cause injury	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 1 year, or fine or both.	Presidency Magistrate or Magistrate of the first or second class.

CHAPTER XIX. — CRIMINAL BREACH OF CONTRACTS OF SERVICE.

490	Being bound by contract to render personal service during a voyage or journey, or to convey or guard any property or person and voluntarily omitting to do so.	Shall not arrest without warrant.	Summons	...	Bailable	...	Compounded.	Imprisonment of either description for 1 month, or fine of 100 rupees, or both.	Presidency Magistrate, or Magistrate of the first or second class.
491	Being bound to attend on or supply the wants of a person who is helpless from youth, unsoundness of mind or disease, and voluntarily omitting to do so.	Ditto	Ditto	...	Ditto	...	Ditto	Imprisonment or either description for 3 months, or fine of 200 rupees, or both.	Ditto.
492	Being bound by contract to render personal service for a certain period at a distant place to which the employee is conveyed at the expense of the employer, and voluntarily deserting the service or refusing to perform the duty.	Ditto	Ditto	...	Ditto	...	Ditto	Imprisonment of either description for 1 month, or fine of double the expense incurred, or both.	Ditto.

SCHEDULE II—continued.
CHAPTER XX.—OFFENCES RELATING TO MARRIAGE.

1 Section.	2 Offence.	3 Whether the police may arrest without warrant or not.	4 Whether a war- rant or a summons shall ordinarily issue in the first instance.	5 Whether bail- able or not.	6 Whether compoundable or not.	7 Punishment under the Indian Penal Code.	8 By what Court triable.
493	A man by deceit causing a woman not lawfully married to him to believe that she is lawfully married to him, and to cohabit with him in that belief.	Shall not arrest without warrant.	Warrant ...	Not bailable...	Not compoundable.	Imprisonment of either description for 10 years, and fine.	Court of Session.
494	Marrying again during the lifetime of a husband or wife.	Ditto ...	Ditto ...	Bailable ...	Ditto ...	Imprisonment of either description for 7 years, and fine.	Ditto.
495	Same offence with concealment of the former marriage from the person with whom subsequent marriage is contracted.	Ditto ...	Ditto ...	Not bailable .	Ditto ...	Imprisonment of either description for 10 years and fine.	Ditto.
496	A person with fraudulent intention going through the ceremony of being married, knowing that he is not thereby lawfully married.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Imprisonment of either description for 7 years and fine.	Ditto.
497	A dultury	Ditto ...	Ditto ...	Bailable ...	Compoundable.	Imprisonment of either description for 5 years, or fine, or both.	Court of Session, Presidency Magistrate, or Magistrate of the first class.
498	Enticing or taking away or detaching with a criminal intent a married woman.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Imprisonment of either description for 2 years, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.

CHAPTER XXI.—DEFAMATION.

500	Defamation	Shall not arrest without warrant.	Warrant.	...	Bailable	...	Compoundable.	Simple imprisonment for 2 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first class.
501	Printing or engraving matter knowing it to be defamatory.	Ditto	Ditto	...	Ditto	...	Ditto	Ditto	Ditto.
502	Sale of printed or engraved substance containing defamatory matter knowing it to contain such matter.	Ditto	Ditto	...	Ditto	...	Ditto	Ditto	Ditto.

CHAPTER XXII.—CRIMINAL INTIMIDATION, INSULT AND ANNOYANCE.

504	Insult intended to provoke a breach of the peace.	Shall not arrest without warrant.	Warrant	...	Bailable	...	Compoundable	Imprisonment of either description for 2 years, or fine, or both.	Any Magistrate.
505	False statement, rumour, etc., circulated with intent to cause mutiny or offence against the public peace.	Ditto	Ditto	...	Not bailable...	...	Not compoundable.	Ditto	Presidency Magistrate or Magistrate of the first class.
506	Criminal intimidation ... If threat be to cause death or grievous hurt, etc.	Ditto	Ditto	...	Bailable	...	Compoundable	Imprisonment of either description for 7 years, or fine, or both.	Ditto.
507	Criminal intimidation by anonymous communication or having taken precaution to conceal whence the threat comes.	Ditto	Ditto	...	Ditto	...	Not compoundable.	Imprisonment of either description for 2 years in addition to the punishment under above section.	Court of Session, Presidency Magistrate or Magistrate of the first class.
508	Act caused by inducing a person to believe that he will be rendered an object of Divine displeasure.	Ditto	Ditto	...	Ditto	...	Ditto	Imprisonment of either description for 1 year, or fine, or both.	Ditto.

If punishable with imprisonment for 3 years and upwards, but less than seven.	Ditto	...	Ditto	...	Ditto	...	...	Court of Session, Presidency Magistrate or Magistrate of the first class.
If punishable with imprisonment for one year and upwards, but less than 3 years.	Shall not arrest without warrant.	Summons	...	Bailable	...	Ditto	...	Court of Session, Presidency Magistrate or Magistrate of the first or second class.
If punishable with imprisonment for less than one year, or with fine only.	Ditto	Ditto	...	Ditto	...	Ditto	...	Any Magistrate.

SCHEDULE III.

(See Section 36).

ORDINARY POWERS OF PROVINCIAL MAGISTRATES.

I.—Ordinary Powers of a Magistrate of the Third Class.

- (1) Power to arrest or direct the arrest, and to commit to custody, a person committing an offence in his presence, Section 64.
- (2) Power to arrest, or direct the arrest in his presence of, an offender, Section 65.
- (3) Power to endorse a warrant, or to order the removal of an accused person arrested under a warrant, Sections 83, 84 and 86.
- (4) Power to issue proclamations in cases judicially before him, Section 87.
- (5) Power to attach and sell property in cases judicially before him, Section 88.
- (6) Power to restore attached property, Section 89.
- (7) Power to require search to be made for letters and telegrams, Section 95.
- (8) Power to issue search-warrant, Section 96.
- (9) Power to endorse a search-warrant and order delivery of thing found, Section 99.
- (10) Power to command unlawful assembly to disperse, Section 127.
- (11) Power to use civil force to disperse unlawful assembly, Section 128.
- (12) Power to require military force to be used to disperse unlawful assembly, Section 130.
- (13) Power to record statements or confessions during a police-investigation, Section 164.
- (14) Power to authorise detention of a person during a police-investigation, Section 167.
- (15) Power to detain an offender found in Court, Section 351.
- (16) Power to take cognizance of offence, although committed by European British subject, and to issue process returnable before a Magistrate having jurisdiction, Section 445.
- (17) Power to apply to District Magistrate to issue commission for examination of witness, Section 506 (2).
- (18) Power to recover forfeited bond for appearance before Magistrate's Court, Section 514.
- (19) Power to make order as to disposal of property, Section 517.
- (20) Power to sell perishable property of a suspected character, Section 525.

II.—Ordinary Powers of a Magistrate of the Second Class.

- (1) The ordinary powers of a Magistrate of the third class.
- (2) Power to order the police to investigate an offence in cases in which the Magistrate has jurisdiction to try or commit for trial, Section 155.
- (3) Power to postpone issue of process, Section 202.
- (4) Power to order destruction of libellous and other matter, Section 521.

III.—Ordinary Powers of a Magistrate of the First Class.

- (1) The ordinary powers of a Magistrate of the second class.
- (2) Power to issue search-warrant otherwise than in course of an inquiry, Section 96.
- (3) Power to issue search-warrant for discovery of persons wrongfully confined, Section 100.
- (4) Power to require security to keep the peace, Section 107.
- (5) Power to require security for good behaviour, Section 109.
- (6) Power to discharge sureties, Section 126.
- (7) Power to make orders, etc., in possession cases, Sections 145, 146 and 147.
- (8) Power to commit for trial, Section 206.
- (9) Power to stop proceedings when no complainant, Section 249.
- (10) Power to make orders of maintenance, Sections 488 and 489.
- (11) Power to take evidence on commission, Section 503.
- (12) Power to recover penalty on forfeited bond, Section 514.
- (13) Power to make order as to first offenders, Section 562.

IV.—Ordinary Powers of a Subdivisional Magistrate.

- (1) The ordinary powers of a Magistrate of the first class.
- (2) Power to direct warrants to landholders, Section 78.
- (3) Power to require security for good behaviour, Section 110.
- (4) Power to make orders as to local nuisances, Section 133.
- (5) Power to make orders prohibiting repetitions of nuisances, Section 143.
- (6) Power to make orders under Section 144.
- (7) Power to depute Subordinate Magistrate to make local inquiry, Section 148.
- (8) Power to order police-investigation into cognizable case, Section 156.
- (9) Power to receive report of police-officer and pass order, Section 173.
- (10) Power to hold inquests, Section 174.
- (11) Power to issue process for person within local jurisdiction who has committed an offence outside the local jurisdiction, Section 186.

- (12) Power to entertain complaints, Section 190.
- (13) Power to receive police-reports, Section 190.
- (14) Power to entertain cases without complaint ; Section 190.
- (15) Power to transfer cases to a Subordinate Magistrate, Section 192.
- (16) Power to pass sentence on proceedings recorded by a Subordinate Magistrate, Section 349.
- (17) Power to forward record of inferior Court to District Magistrate, Section 435 (2).
- (18) Power to sell property alleged or suspected to have been stolen, etc., Section 524.
- (19) Power to withdraw cases other than appeals, and to try or refer them for trial, Section 528.
- (20) Power to order released convicts to notify residence, Section 565.

V.—Ordinary Powers of a District Magistrate.

- (1) The ordinary powers of a Subdivisional Magistrate.
- (2) Power to require delivery of letters, telegrams, etc., Section 95.
- (3) Power to issue search-warrants for documents in custody of postal or telegraph authorities, Section 96.
- (4) Power to require security for good behaviour in case of sedition, Section 108.
- (5) Power to discharge persons bound to keep the peace or to be of good behaviour, Section 124.
- (6) Power to cancel bond for keeping the peace, Section 125.
- (7) Power to try summarily, Section 260.
- (8) Power to quash convictions in certain cases, Section 350.
- (9) Power to hear appeals from orders requiring security for good behaviour, Section 406.
- (10) Power to hear or refer appeals from convictions by Magistrates of the second and third classes, Section 407.
- (11) Power to call for records, Section 435.
- (12) Power to order commitment, Section 436.
- (13) Power to order inquiry into complaint dismissed or case of accused discharged, Section 437.
- (14) Power to report case to High Court, Section 438.
- (15) Power to try European British subjects, Section 443.
- (16) Power to sentence European British subject to more than three months' imprisonment or one thousand rupees fine, or both, Section 446.
- (17) Power to appoint person to be public prosecutor in particular case, Section 492 (2).
- (18) Power to issue commission for examination of witness, Sections 503, 506.
- (19) Power to hear appeals from or revise orders passed under Section 514, Section 515.
- (20) Power to compel restoration of abducted female, Section 552.

SCHEDULE IV.

(See Sections 37 and 38).

ADDITIONAL POWERS WITH WHICH PROVINCIAL MAGISTRATES MAY BE INVESTED.

POWERS WITH WHICH
A MAGISTRATE OF
THE FIRST CLASS
MAY BE INVESTED. } BY THE LOCAL
GOVERN-
MENT.

- (1) Power to require security for good behaviour in case of sedition, Section 108 :
- (2) Power to require security for good behaviour, Section 110 :
- (3) Power to make orders as to local nuisances, Section 133 :
- (4) Power to make orders prohibiting repetitions of nuisances, Section 143 :
- (5) Power to make orders under Section 144 :
- (6) Power to hold inquests, Section 174 :
- (7) Power to issue process for person within local jurisdiction who has committed an offence outside the local jurisdiction, Section 186 :
- (8) Power to take cognizance of offences upon complaint, Section 190:
- (9) Power to take cognizance of offences upon police-reports, Section 190 :

**POWERS WITH WHICH
A MAGISTRATE OF
THE FIRST CLASS
MAY BE INVESTED.**

BY THE LOCAL
GOVERN-
MENT.

BY THE DIS-
TRICT MAG-
ISTRATE.

- (10) Power to take cognizance of offences without complaint, Section 190 :
- (11) Power to try summarily, Section 260 :
- (12) Power to hear appeals from convictions by Magistrates of the second and third classes, Section 407 :
- (13) Power to sell property alleged or suspected to have been stolen, etc., Section 524 :
- (14) Power to order released convicts to notify residence, Section 565 :
- (15) Power to try cases under Section 124A of the Indian Penal Code.
- (1) Power to make orders prohibiting repetitions of nuisances, Section 143 :
- (2) Power to make orders under Section 144 :
- (3) Power to hold inquests, Section 174 :
- (4) Power to take cognizance of offences upon complaint, Section 190 :
- (5) Power to take cognizance of offences upon police-reports, Section 190 :
- (6) Power to transfer cases, Section 192.

**POWERS WITH WHICH
A MAGISTRATE OF
THE SECOND CLASS
MAY BE INVESTED.**

BY THE LOCAL
GOVERN-
MENT.

BY THE DIS-
TRICT MA-
GISTRATE.

- (1) Power to pass sentences of whipping, Section 32 :
- (2) Power to make orders prohibiting repetitions of nuisances, Section 143 :
- (3) Power to make orders under Section 144 :
- (4) Power to hold inquests, Section 174 :
- (5) Power to take cognizance of offences upon complaint, Section 190 :
- (6) Power to take cognizance of offences upon police-reports, Section 190 :
- (7) Power to take cognizance of offences without complaint, Section 190 :
- (8) Power to commit for trial, Section 206 :
- (9) Power to make order as to first offenders, Section 562.
- (1) Power to make orders prohibiting repetitions of nuisances, Section 143 :
- (2) Power to make orders under Section 144 :
- (3) Power to hold inquests, Section 174 :
- (4) Power to take cognizance of offences upon complaint, Section 190 :
- (5) Power to take cognizance of offences upon police-reports, Section 190.

**POWERS WITH WHICH
A MAGISTRATE OF
THE THIRD CLASS
MAY BE INVESTED.**

BY THE LOCAL
GOVERN-
MENT.

BY THE DIS-
TRICT MA-
GISTRATE.

- (1) Power to make orders prohibiting repetitions of nuisances, Section 143 :
- (2) Power to make orders under Section 144 :
- (3) Power to hold inquests, Section 174 :
- (4) Power to take cognizance of offences upon complaint, Section 190 :
- (5) Power to take cognizance of offences upon police-reports, Section 190 :
- (6) Power to commit for trial, Section 206.
- (1) Power to make orders prohibiting repetitions of nuisances, Section 143 :
- (3) Power to make orders under Section 144 :
- (3) Power to hold inquests, Section 174 :
- (4) Power to take cognizance of offences upon complaint, Section 190 :
- (5) Power to take cognizance of offence upon police-reports, Section 190.

POWERS WITH WHICH { BY THE LOCAL
A SUBDIVISIONAL { GOVERN-
MAGISTRATE MAY { MENT.
BE INVESTED. } Power to call for records, Section 435.

SCHEDULE V.

(See Section 554).

FORMS.

I.—SUMMONS TO AN ACCUSED PERSON.

(See Section 68).

To _____ of _____
WHEREAS your attendance is necessary to answer to a charge of (*state shortly the offence charged*), you are hereby required to appear in person (*or by pleader, as the case may be*) before the (*Magistrate*) of _____ Herein fail not.
the _____ day of _____

Dated this _____ day of _____, 18 _____
(Seal).

(Signature).

II.—WARRANT OF ARREST.

(See Section 75).

To (*name and designation of the person or persons who is or are to execute the warrant*).

WHEREAS _____ of _____ stands charged with the offence of (*state the offence*), you are hereby directed to arrest the said _____, and to produce him before me. Herein fail not.

Dated this _____ day of _____, 18 _____
(Seal).

(Signature).

(See Section 76).

This warrant may be endorsed as follows:—

If the said _____ shall give bail himself in the sum of _____, with one surety in the sum of _____ (or two sureties each in the sum of _____) to attend before me on the _____ day of _____ and to continue so to attend until otherwise directed by me, he may be released.

Dated this _____ day of _____, 18 _____

(Signature).

III.—BOND AND BAIL-BOND AFTER ARREST UNDER A WARRANT.

(See Section 86).

I, (*name*) of _____, being brought before the District Magistrate of _____, (*or as the case may be*) under a warrant issued to compel my appearance to answer to the charge of _____, do hereby bind myself to attend in the Court of _____ on the _____ day of _____ next, to answer to the said charge, and to continue so to attend until otherwise directed by the Court; and, in case of my making default therein, I bind myself to forfeit, to Her Majesty the Queen, Empress of India, the sum of rupees _____

Dated this _____ day of _____, 18 _____

(Signature).

I do hereby declare myself surety for the abovenamed _____ of _____, that he shall attend before _____ in the Court of _____ on the _____ day of _____ next to answer to the charge on which he has been arrested, and shall continue so to attend until otherwise directed by the Court; and, in case of his making default therein, I bind myself to forfeit to Her Majesty the Queen, Empress of India, the sum of rupees _____

Dated this _____ day of _____, 18 _____

(Signature).

IV.—PROCLAMATION REQUIRING THE APPEARANCE OF A PERSON ACCUSED.

(See Section 87).

WHEREAS complaint has been made before me that (*name, description and address*) has committed (or is suspected to have committed) the offence of _____, punishable under Section _____ of the Indian Penal Code, and it has been returned to a warrant of arrest thereupon issued that the said (*name*) cannot be found; and whereas it has been shown to my satisfaction that the said (*name*) has absconded (or is concealing himself to avoid the service of the said warrant);

Proclamation is hereby made that the said _____ of _____ is required to appear at (*place*) before this Court (or before me) to answer the said complaint within _____ days from this date.

Dated this _____ day of _____, 18 _____.

(Seal).

(Signature).

V.—PROCLAMATION REQUIRING THE ATTENDANCE OF A WITNESS.

(See Section 87).

WHEREAS complaint has been made before me that (*name, description and address*) has committed (or is suspected to have committed) the offence of (*mention the offence concisely*) and a warrant has been issued to compel the attendance of (*name, description and address of the witness*) before this Court to be examined touching the matter of the said complaint; and whereas it has been returned to the said warrant that the said (*name of witness*) cannot be served, and it has been shown to my satisfaction that he has absconded (or is concealing himself to avoid the service of the said warrant);

Proclamation is hereby made that the said (*name*) is required to appear at (*place*) before the Court of _____ on the _____ day of _____ next at _____ o'clock, to be examined touching _____, the offence complained of.

Dated this _____ day of _____, 18 _____.

(Seal).

(Signature).

VI.—ORDER OF ATTACHMENT TO COMPEL THE ATTENDANCE OF A WITNESS.

(See Section 88).

To the Police-officer in charge of the Police-station at _____

WHEREAS a warrant has been duly issued to compel the attendance of (*name, description and address*) to testify concerning a complaint pending before this Court, and it has been returned to the said warrant that it cannot be served; and whereas it has been shown to my satisfaction that he has absconded (or is concealing himself to avoid the service of the said warrant); and thereupon a Proclamation was duly issued and published requiring the said _____ to appear and give evidence at the time and place mentioned therein, and he has failed to appear;

This is to authorise and require you to attach by seizure the moveable property belonging to the said _____ to the value of rupees _____ which you may find within the District of _____ and to hold the said property under attachment pending the further order of this Court, and to return this warrant with an endorsement certifying the manner of its execution.

Dated this _____ day of _____, 18 _____.

(Seal).

(Signature).

ORDER OF ATTACHMENT TO COMPEL THE APPEARANCE OF A PERSON ACCUSED.

(See Section 88).

To (*name and designation of the person or persons who is or are to execute the warrant*).

WHEREAS complaint has been made before me that (*name description and address*) has committed (or is suspected to have committed) the offence of _____, punishable under Section _____ of the Indian Penal Code, and it has been returned to a warrant of arrest thereupon issued that the said (*name*) cannot be found; and whereas it has been shown to my satisfaction that the said (*name*) has absconded (or is concealing himself to avoid the service

of the said warrant), and thereupon a Proclamation was duly issued and published requiring the said to appear to answer the said charge within days; and whereas the said is possessed of the following property other than land paying revenue to Government in the village (or town) of , in the District of , viz., , and an order has been made for the attachment thereof;

You are hereby required to attach the said property by seizure, and to hold the same under attachment pending the further order of this Court, and to return this warrant with an endorsement certifying the manner of its execution.

Dated this day of , 18 .

(Seal).

(Signature).

ORDER AUTHORISING AN ATTACHMENT BY THE DEPUTY COMMISSIONER AS COLLECTOR.

(See Section 88).

To the Deputy Commissioner of the District of

WHEREAS complaint has been made before me that (name, description and address) has committed (or is suspected to have committed) the offence of , punishable under Section of the Indian Penal Code, and it has been returned to a warrant of arrest thereupon issued that the said (name) cannot be found; and whereas it has been shown to my satisfaction that the said (name) has absconded (or is concealing himself to avoid the service of the said warrant) and thereupon a Proclamation was duly issued and published requiring the said to appear to answer the said charge within days, but he has not appeared; and whereas the said is possessed of certain land paying revenue to Government in the village (or town) of in the district of

You are hereby authorised and requested to cause the said land to be attached, and to be held under attachment pending the further order of this Court, and to certify without delay what you may have done in pursuance of this order.

Dated this day of , 18 .

(Seal).

(Signature).

VII.—WARRANT IN THE FIRST INSTANCE TO BRING UP A WITNESS.

(See Section 90).

To (name and designation of the Police-officer or other person or persons who is or are to execute the warrant).

WHEREAS complaint has been made before me that of has (or is suspected to have) committed the offence of (mention the offence concisely), and it appears likely that (name and description of witness) can give evidence concerning the said complaint; and whereas I have good and sufficient reason to believe that he will not attend as a witness on the hearing of the said complaint unless compelled to do so;

This is to authorise and require you to arrest the said (name) and on the day of to bring him before this Court, to be examined touching the offence complained of.

Given under my hand and the seal of the Court, this day of , 18 .

(Seal).

(Signature).

VIII.—WARRANT TO SEARCH AFTER INFORMATION OF A PARTICULAR OFFENCE.

(See Section 96).

To (name and designation of the Police-officer or other person or persons who is or are to execute the warrant).

WHEREAS information has been laid (or complaint has been made) before me of the commission (or suspected commission) of the offence of (mention the offence concisely), and it has been made to appear to me that the production of (specify the thing clearly) is essential to the inquiry now being made (or about to be made) into the said offence (or suspected offence);

This is to authorise and require you to search for the said *(the thing specified)* in the *(describe the house or place or part thereof to which the search is to be confined)*, and, if found, to produce the same forthwith before this Court returning this warrant, with an endorsement certifying what you have done under it, immediately upon its execution.

Given under my hand and the seal of the Court, this day of , 18 .

(Seal).

. (Signature).

IX.—WARRANT TO SEARCH SUSPECTED PLACE OF DEPOSIT.

(See Section 98).

To (name and designation) of a Police-officer above the rank of a Constable).

WHEREAS information has been laid before me, and on due inquiry thereupon had I have been led to believe that the (describe the house or other place) is used as a place for the deposit (or sale) of stolen property (or if for either of the other purposes expressed in the section state the purpose in the words of the section);

This is to authorise and require you to enter the said house (or other place) with such assistance as shall be required, and to use, if necessary, reasonable force for that purpose, and to search every part of the said house (or other place, or if the search is to be confined to a part specify the part clearly), and to seize and take possession of any property (or documents, or stamps, or seals, or coins, as the case may be) - [Add (when the case requires it) and also of any instruments and materials which you may reasonably believe to be kept for the manufacture of forged documents, or counterfeit stamps, or false seals, or counterfeit coin (as the case may be)], and forthwith to bring before this Court such of the said things as may be taken possession of, returning this warrant, with an endorsement certifying what you have done under it, immediately upon its execution.

Given under my hand and the seal of the Court, this day of 18 .

(Seal).

(Signature).

X.—BOND TO KEEP THE PEACE.

(See Section 107).

WHEREAS I, (name), inhabitant of (place), have been called upon to enter into a bond to keep the peace for the term of _____, I hereby bind myself not to commit a breach of the peace, or do any act that may probably occasion a breach of the peace, during the said term; and, in case of my making default therein, I hereby bind myself to forfeit to Her Majesty the Queen, Empress of India, the sum of rupees _____

Dated this day of , 18 .

(Signature).

XI.—BOND FOR GOOD BEHAVIOUR.

(See Sections 108, 109 and 110).

WHEREAS I, (name), inhabitant of (place), have been called upon to enter into a bond to be of good behaviour to Her Majesty the Queen, Empress of India, and to all Her subjects for the term of (state the period), I hereby bind myself to be of good behaviour to Her Majesty and to all Her subjects during the said term; and, in case of my making default therein, I bind myself to forfeit to Her Majesty the sum of rupees

Dated this day of , 18 .

(Signature).

(Where a bond with sureties is to be executed and)—We do hereby declare ourselves sureties for the above-named _____ that he will be of good behaviour to Her Majesty the Queen, Empress of India, and to all Her subjects during the said term; and, in case of his making default therein, we bind ourselves, jointly and severally, to forfeit to Her Majesty the sum of rupees _____.

Dated this day of , 18 .

(Signature).

XII.—SUMMONS ON INFORMATION OF A PROBABLE BREACH OF THE PEACE.

(See Section 114).

To _____ of _____

WHEREAS it has been made to appear to me by credible information that (*state the substance of the information*), and that you are likely to commit a breach of the peace (or by which act a breach of the peace will probably be occasioned), you are hereby required to attend in person (or by a duly authorised agent) at the Office of the Magistrate of _____ on the day of _____ 18, at ten o'clock in the forenoon to show cause why you should not be required to enter into a bond for rupees _____ [when sureties are required, add— and also to give security by the bond of one (or two as the case may be) surety (or sureties) in the sum of rupees _____ (each if more than one)], that you will keep the peace for the term of _____

Given under my hand and the seal of the Court, this _____ day of _____, 18 _____.
(Seal.) (Signature).

XIII.—WARRANT OF COMMITMENT ON FAILURE TO FIND SECURITY TO KEEP THE PEACE.

(See Section 123).

To the Superintendent (or Keeper) of the Jail at _____

WHEREAS (*name and address*) appeared before me in person (or by his authorised agent) on the _____ day of _____ in obedience to a summons calling upon him to show cause why he should not enter into a bond for rupees _____ with one surety (or a bond with two sureties each in rupees _____), that he, the said (*name*) would keep the peace for the period of _____ months; and whereas an order was then made requiring the said (*name*) to enter into and find such security (*state the security ordered when it differs from that mentioned in the summons*), and he has failed to comply with the said order;

This is to authorise and require you, the said Superintendent (or Keeper), to receive the said (*name*) into your custody, together with this warrant, and him safely to keep in the said jail for the said period of (*term of imprisonment*) unless he shall in the meantime comply with the said order by himself and his surety (or sureties) entering into the said bond, in which case the same shall be received, and the said (*name*) released, and to return this warrant with an endorsement certifying the manner of its execution.

Given under my hand and the seal of the Court, this _____ day of _____, 18 _____.
(Seal.) (Signature).

XIV.—WARRANT OF COMMITMENT ON FAILURE TO FIND SECURITY FOR GOOD BEHAVIOUR.

(See Section 123).

To the Superintendent (or Keeper) of the Jail at _____

WHEREAS it has been made to appear to me that (*name and description*) has been and is lurking within the district of _____ having no ostensible means of subsistence (or, and that he is unable to give any satisfactory account of himself);

or

WHEREAS evidence of the general character of (*name and description*) has been adduced before me and recorded, from which it appears that he is an habitual robber (or house-breaker, etc., as the case may be);

And whereas an order has been recorded stating the same and requiring the said (*name*) to furnish security for his good behaviour for the term of (*state the period*) by entering into a bond with one surety (or two or more sureties, as the case may be), himself for rupees _____ and the said surety (or each of the said sureties) for rupees _____, and the said (*name*) has failed to comply with the said order and for such default has been adjudged imprisonment for (*state the term*) unless the said security be sooner furnished;

This is to authorise and require you, the said Superintendent (or Keeper), to receive the said (*name*) into your custody, together with this warrant and him safely to keep in the said jail for the said period of (*term of imprisonment*) unless he shall in the meantime comply with the said order by himself and his surety (or sureties) entering into the said bond, in which case

the same shall be received and the said (*name*) released, and to return this warrant with an endorsement certifying the manner of its execution.

Given under my hand and the seal of the Court, this _____ day of _____, 18 ____.
(*Seal*). _____ (*Signature*).

XV.—WARRANT TO DISCHARGE A PERSON IMPRISONED ON FAILURE TO GIVE SECURITY.

(*See Sections 123 and 124*).

To the Superintendent (*or Keeper*) of the Jail at _____ (*or other officer in whose custody the person is*).

WHEREAS (*name and description of prisoner*) was committed to your custody under warrant of the Court, dated the _____ day of _____, and has since duly given security under Section _____ of the Code of Criminal Procedure ;

or
and there have appeared to me sufficient grounds for the opinion that he can be released without hazard to the community ;

This is to authorise and require you forthwith to discharge the said (*name*) from your custody, unless he is liable to be detained for some other cause.

Given under my hand and the seal of the Court, this _____ day of _____, 18 ____.
(*Seal*). _____ (*Signature*).

XVI.—ORDER FOR THE REMOVAL OF NUISANCES.

(*See Section 133*).

To (*name, description and address*).

WHEREAS it has been made to appear to me that you have caused an obstruction (*or nuisance*) to persons using the public roadway (*or other public place*) which, etc., (*describe the road or public place*), by etc., (*state what it is that causes the obstruction or nuisance*), and that such obstruction (*or nuisance*) still exists ;

or

WHEREAS it has been made to appear to me that you are carrying on as owner, or manager the trade or occupation of (*state the particular trade or occupation and the place where it is carried on*), and that the same is injurious to the public health (*or comfort*) by reason (*state briefly in what manner the injurious effects are caused*), and should be suppressed or removed to a different place ;

or

WHEREAS it has been made to appear to me that you are the owner (*or are in possession of or have the control over*) a certain tank (*or well or excavation*) adjacent to the public way (*describe the thoroughfare*), and that the safety of the public is endangered by reason of the said tank (*or well or excavation*) being without a fence (*or insecurely fenced*) ;

or

WHEREAS, etc., etc. (*as the case may be*) ;

I do hereby direct and require you within (*state the time allowed*) to (*state what is required to be done to abate the nuisance*) or to appear at _____ in the _____ Court of _____ on the _____ day of _____ next, and to show cause why this order should not be enforced ;

or

I do hereby direct and require you within (*state the time allowed*) to cease carrying on the said trade or occupation at the said place, and not again to carry on the same. or to remove the said trade from the place where it is now carried on, or to appear, etc. ;

or

I do hereby direct and require you within (*state the time allowed*) to put up a sufficient fence (*state the kind of fence and the part to be fenced*) ; or to appear, etc.

or

I do hereby direct and require you, etc., etc. (*as the case may be*).

Given under my hand and the seal of the Court, this _____ day of _____, 18 ____.
(*Seal*). _____ (*Signature*).

XVII.—MAGISTRATE'S ORDER CONSTITUTING A JURY.

(See Section 138).

WHEREAS on the _____ day of _____, 18____, an order was issued to (name) requiring him (*state the effect of the order*), and whereas the said (name) has applied to me, by a petition bearing date the _____ day of _____, for an order appointing a Jury to try whether the said recited order is reasonable and proper; I do hereby appoint (*the names, etc., of the five or more Jurors*) to be the Jury to try and decide the said question, and do require the said Jury to report their decision within _____ days from the date of this order at my office at _____.

Given under my hand and the seal of the Court, this _____ day of _____, 18____.

(Seal). _____ (Signature).

XVIII.—MAGISTRATE'S NOTICE AND PEREMPTORY ORDER AFTER THE FINDING BY A JURY.

(See Section 140).

To (name, description and address).

I HEREBY give you notice that the Jury duly appointed on the petition presented by you on the _____ day of _____ have found that the order issued on the _____ day of _____ requiring you (*state substantially the requisition in the order*) is reasonable and proper. Such order has been made absolute, and I hereby direct and require you to obey the said order within (*state the time allowed*), on peril of the penalty provided by the Indian Penal Code, XLV of 1860, for disobedience thereto.

Given under my hand and the seal of the Court, this _____ day of _____, 18____.

(Seal). _____ (Signature).

XIX.—INJUNCTION TO PROVIDE AGAINST IMMINENT DANGER PENDING INQUIRY BY JURY.

(See Section 142).

To (name, description and address).

WHEREAS the inquiry by a Jury appointed to try whether my order issued on the _____ day of _____, 18____, is reasonable and proper is still pending, and it has been made to appear to me that the nuisance mentioned in the said order is attended with so imminent serious danger to the public as to render necessary immediate measures to prevent such danger, I do hereby, under the provisions of Section 142 of the Code of Criminal Procedure, direct and enjoin you forthwith to (*state plainly what is required to be done as a temporary safe-guard*), pending the result of the local inquiry by the Jury.

Given under my hand and the seal of the Court, this _____ day of _____, 18____.

(Seal). _____ (Signature).

XX.—MAGISTRATE'S ORDER PROHIBITING THE REPETITION, ETC., OF A NUISANCE.

(See Section 143).

To (name, description and address).

WHEREAS it has been made to appear to me that, etc. (*state the proper recital, guided by Form No. XVI or Form No. XXI, as the case may be*).

I do hereby strictly order and enjoin you not to repeat the said nuisance by again placing or causing or permitting to be placed, etc. (*as the case may be*).

Given under my hand and the seal of the Court, this _____ day of _____, 18____.

(Seal). _____ (Signature).

XXI.—MAGISTRATE'S ORDER TO PREVENT OBSTRUCTION, ETC.,

(See Section 144).

To (name, description and address).

WHEREAS it has been made to appear to me that you are in possession (or have the management) of (*describe clearly the property*), and that, in digging a drain on the said land,

XXVIII.—CHARGES.

(See Sections 221, 222, 223.)

(1)—CHARGES WITH ONE HEAD.

(a) I, (name and office of Magistrate, etc.), hereby charge you (name of accused person) as follows :—

(b) That you, on or about the _____ day of _____, at _____, waged war against Her Majesty the Queen, Empress of India, and thereby committed an offence punishable under section 121 of the Indian Penal Code, and within the cognizance of the Court of Session (when the charge is framed by a Presidency Magistrate, for Court of Session substitute High Court).

(c) And I hereby direct that you be tried by the said Court on the said charge.

(Signature and seal of the Magistrate.)

[To be substituted for (b)] :—

(2) That you, on or about the _____ day of _____, at _____, with the intention of inducing the Hon'ble A. B., Member of the Council of the Governor-General of India, to refrain from exercising a lawful power as such Member, assaulted such Member, and thereby committed an offence punishable under section 124 of the Indian Penal Code, and within the cognizance of the Court of Session (or High Court).

(3) That you, being a public servant in the _____ Department, directly accepted from (state the name), for another party (state the name), a gratification, other than legal remuneration, as a motive for forbearing to do an official act, and thereby committed an offence punishable under section 161 of the Indian Penal Code, and within the cognizance of the Court of Session (or High Court).

(4) That you, on or about the _____ day of _____, at _____, did (or omitted to do, as the case may be) _____, contrary to the provisions of Act _____, section _____, and known by you to be prejudicial to _____, and thereby committed an offence punishable under section 166 of the Indian Penal Code, and within the cognizance of the Court of Session (or High Court).

(5) That you, on or about the _____ day of _____, at _____, in the _____ course of the trial of _____, before _____, in evidence that " _____", which statement you either knew or believed to be false, or did not believe to be true, and thereby committed an offence punishable under section 193 of the Indian Penal Code, and within the cognizance of the Court of Session (or High Court).

(6) That you, on or about the _____ day of _____, at _____, committed culpable homicide not amounting to murder, causing the death of _____, and thereby committed an offence punishable under section 304 of the Indian Penal Code, and within the cognizance of the Court of Session (or High Court).

(7) That you, on or about the _____ day of _____, at _____, abetted the commission of suicide by A. B., a person in a state of intoxication, and thereby committed an offence punishable under section 306 of the Indian Penal Code, and within the cognizance of the Court of Session (or High Court).

(8) That you, on or about the _____ day of _____, at _____, voluntarily caused grievous hurt to _____, and thereby committed an offence punishable under section 325 of the Indian Penal Code and within the cognizance of the Court of Session (or High Court).

(9) That you, on or about the _____ day of _____, at _____, robbed (state the name), and thereby committed an offence punishable under section 392 of the Indian Penal Code, and within the cognizance of the Court of Session (or High Court).

(10) That you, on or about the _____ day of _____, at _____, committed dacoity, an offence punishable under section 395 of the Indian Penal Code, and within the cognizance of the Court of Session (or High Court).

[In cases tried by Magistrates substitute "within my cognizance" for "within the cognizance of the Court of Session," and in (c) omit "by the said Court."]

(II)—CHARGES WITH TWO OR MORE HEADS.

(a) I, (name and office of *Magistrate, etc.*), hereby charge you (name of accused person), as follows :—

(b) *First.*—That you, on or about the _____ day of _____, at _____, knowing a coin to be counterfeit, delivered the same to another person, by name *A. B.*, as genuine, and thereby committed an offence punishable under section 241 of the Indian Penal Code, and within the cognizance of the Court of Session (or High Court).

Secondly.—That you, on or about the _____ day of _____, at _____, knowing a coin to be counterfeit, attempted to induce another person, by name *A. B.*, to receive it as genuine, and thereby committed an offence punishable under section 241 of the Indian Penal Code, and within the cognizance of the Court of Session (or High Court).

(c) And I hereby direct that you be tried by the said Court on the said charge.

(Signature and seal of the *Magistrate.*)

[To be substituted for (b)] :—

(2) *First.*—That you, on or about the _____ day of _____, at _____, committed murder by causing the death of _____, and thereby committed an offence punishable under section 302 of the Indian Penal Code, and within the cognizance of the Court of Session (or High Court).

Secondly.—That you, on or about the _____ day of _____, at _____, by causing the death of _____, committed culpable homicide not amounting to murder, and thereby committed an offence punishable under section 304 of the Indian Penal Code, and within the cognizance of the Court of Session (or High Court).

(3) *First.*—That you, on or about the _____ day of _____, at _____, committed theft and thereby committed an offence punishable under section 379 of the Indian Penal Code, and within the cognizance of the Court of Session (or High Court).

Secondly.—That you, on or about the _____ day of _____, at _____, committed theft, having made preparation for causing death to a person in order to the committing of such theft, and thereby committed an offence punishable under section 382 of the Indian Penal Code, and within the cognizance of the Court of Session (or High Court).

Thirdly.—That you, on or about the _____ day of _____, at _____, committed theft, having made preparation for causing restraint to a person in order to the effecting of your escape after the committing of such theft, and thereby committed an offence punishable under section 382 of the Indian Penal Code, and within the cognizance of the Court of Session (or High Court).

Fourthly.—That you, on or about the _____ day of _____, at _____, committed theft, having made preparation for causing fear of hurt to a person in order to the retaining of property taken by such theft, and thereby committed an offence punishable under section 382 of the Indian Penal Code, and within the cognizance of the Court of Session (or High Court).

(4) That you, on or about the _____ day of _____, at _____, in the course of the inquiry into _____, before _____, stated in evidence that " _____ ", and that you, on or about the _____ day of _____, at _____, in the course of the trial of _____, before _____, stated in evidence that " _____ ", one of which statements you either knew or believed to be false, or did not believe to be true, and thereby committed an offence punishable under section 193 of the Indian Penal Code, and within the cognizance of the Court of Session (or High Court).

[In cases tried by *Magistrates* substitute "within my cognizance" for "within the cognizance of the Court of Session," and in (c) omit "by the said Court."]

(III). CHARGE FOR THEFT AFTER PREVIOUS CONVICTION.

I, (*name and office of Magistrate, etc.*), hereby charge you (*name of accused person*) as follows:—

That you, on or about the _____ day of _____, at _____, committed theft, and thereby committed an offence punishable under section 379 of the Indian Penal Code, and within the cognizance of the Court of Session (or { High Court } { Magistrate } as the case may be).

And you, the said (*name of accused*), stand further charged that you, before the committing of the said offence, that is to say, on the _____ day of _____, had been convicted by the (*state Court by which conviction was had*) at _____ of an offence punishable under Chapter XVII of the Indian Penal Code with imprisonment for a term of three years, that is to say, the offence of house-breaking by night (*describe the offence in the words used in the section under which the accused was convicted*), which conviction is still in full force and effect, and that you are thereby liable to enhanced punishment under section 75 of the Indian Penal Code.

And I hereby direct that you be tried, etc.

XXIX.—WARRANT OF COMMITMENT ON A SENTENCE OF IMPRISONMENT OR FINE IF PASSED BY A MAGISTRATE.

(See Sections 245 and 258).

To the Superintendent (or Keeper) of the Jail at _____

WHEREAS on the _____ day of _____, 18 _____, (*name of prisoner*), the (1st 2nd, 3rd, as the case may be) prisoner in case No. _____ of the Calendar for 18 _____, was convicted before me (*name and official designation*) of the offence of (*mention the offence or offences concisely*) under section (or sections) of the Indian Penal Code (or of Act _____), and was sentenced to (*state the punishment fully and distinctly*);

This is to authorise and require you, the said Superintendent (or Keeper), to receive the said (*prisoner's name*) into your custody in the said Jail, together with this warrant, and there carry the aforesaid sentence into execution according to law.

Given under my hand and the seal of the Court, this _____ day of _____, 18 _____.

(Seal.)

(Signature.)

XXX.—WARRANT OF IMPRISONMENT ON FAILURE TO RECOVER AMENDS BY DISTRESS.

(See Section 250.)

To the Superintendent (or Keeper) of the Jail at _____

WHEREAS (*name and description*) has brought against (*name and description of the accused person*) the complaint that (*mention it concisely*), and the same has been dismissed as frivolous (or vexatious), and the order of dismissal awards payment by the said (*name of complainant*) of the sum of rupees _____ as amends; and whereas the said sum has not been paid and cannot be recovered by distress of the moveable property of the said (*name of complainant*) and an order has been made for his simple imprisonment in jail for the period of _____ days, unless the aforesaid sum be sooner paid;

This is to authorise and require you, the said Superintendent (or Keeper), to receive the said (*name*) into your custody, together with this warrant, and him safely to keep in the said jail for the said period of (*term of imprisonment*), subject to the provisions of section 69 of the Indian Penal Code, unless the said sum be sooner paid, and on the receipt thereof forthwith to set him at liberty, returning this warrant with an endorsement certifying the manner of its execution.

Given under my hand and the seal of the Court, this _____ day of _____, 18 _____.

(Seal.)

(Signature.)

XXXI.—SUMMONS TO WITNESS.

(See Sections 68 and 252).

To

of

WHEREAS complaint has been made before me that _____ of _____ has (or is suspected to have) committed the offence of *(state the offence concisely with time and place)*, and it appears to me that you are likely to give material evidence for the prosecution;

You are hereby summoned to appear before this Court on the _____ day of _____ next at ten o'clock in the forenoon, to testify what you know concerning the matter of the said complaint, and not to depart thence without leave of the Court; and you are hereby warned that, if you shall without just excuse neglect or refuse to appear on the said date, a warrant will be issued to compel your attendance.

Given under my hand and the seal of the Court, this _____ day of _____, 18 .

(Seal.)

(Signature.)

XXXII.—PRECEPT TO DISTRICT MAGISTRATE TO SUMMON JURORS AND ASSESSORS.

(See Section 326.)

To the District Magistrate of

WHEREAS a Criminal Session is appointed to be held in the Court-house at _____ on the _____ day of _____ next, and the names of the persons herein stated have been duly drawn by lot from among those named in the revised list of jurors and assessors furnished to this Court; you are hereby required to summon the said persons to attend at the said Court of Session at 10 A.M. on the said date, and, within such date, to certify that you have done so in pursuance of this precept.

(Here enter the names of Jurors and Assessors.)

Given under my hand and the seal of the Court, this _____ day of _____, 18 .

(Seal.)

(Signature.)

XXXIII.—SUMMONS TO ASSESSOR OR JUROR.

(See Section 328.)

To (name) of (place).

PURSUANT to a precept directed to me by the Court of Session of _____ requiring your attendance as an Assessor (or a Juror) at the next Criminal Session, you are hereby summoned to attend at the said Court of Session at (place) at ten o'clock in the forenoon on the _____ day of _____ next.

Given under my hand and the seal of office, this _____ day of _____, 18 .

(Seal.)

(Signature.)

XXXIV.—WARRANT OF COMMITMENT UNDER SENTENCE OF DEATH.

(See Section 374.)

To the Superintendent (or Keeper) of the Jail at

WHEREAS at the Session held before me on the _____ day of _____, 18 , (name of prisoner), the (1st, 2nd, 3rd, as the case may be) prisoner in case No. _____ of the Calendar at the said Session, was duly convicted of the offence of culpable homicide amounting to murder under section _____ of the Indian Penal Code, and sentenced to suffer death, subject to the confirmation of the said sentence by the _____ Court of _____

This is to authorise and require you, the said Superintendent (or Keeper), to receive the said (prisoner's name) into your custody in the said Jail, together with this warrant, and him there safely to keep until you shall receive the further warrant or order of this Court, carrying into effect the order of the said Court.

Given under my hand and the seal of the Court, this _____ day of _____, 18 .

(Seal.)

(Signature.)

XXXV.—WARRANT OF EXECUTION ON A SENTENCE OF DEATH.

(See Section 381.)

To the Superintendent (or Keeper) of the Jail at _____,

WHEREAS (name of prisoner), the (1st, 2nd, 3rd, as the case may be) prisoner in case No. _____ of the Calendar at the Session held before me on the _____ day of _____, 18____, has been by a warrant of this Court, dated the _____ day of _____, committed to your custody under sentence of death; and whereas the order of the _____ Court of _____ confirming the said sentence has been received by this Court;

This is to authorise and require you, the said Superintendent (or Keeper), to carry the said sentence into execution by causing the said _____ to be hanged by the neck until he be dead, at (time and place of execution), and to return this warrant to the Court with an endorsement certifying that the sentence has been executed.

Given under my hand and the seal of the Court, this _____ day of _____, 18____.
(Seal.) (Signature.)

XXXVI.—WARRANT AFTER A COMMUTATION OF A SENTENCE.

(See Sections 381 and 382.)

To the Superintendent (or Keeper) of the Jail at _____,

WHEREAS at a Session held on the _____ day of _____, 18____, (name of prisoner), the (1st, 2nd, 3rd, as the case may be) prisoner in case No. _____ of the Calendar at the said Session, was convicted of the offence of _____, punishable under section _____ of the Indian Penal Code, and sentenced to _____, and was thereupon committed to your custody; and whereas by the order of the _____ Court of _____ (a duplicate of which is hereunto annexed) the punishment adjudged by the said sentence has been commuted to the punishment of transportation for life (or as the case may be);

This is to authorise and require you, the said Superintendent (or Keeper), safely to keep the said (prisoner's name) in your custody in the said Jail, as by law is required, until he shall be delivered over by you to the proper authority and custody for the purpose of his undergoing the punishment of transportation under the said order,

or
if the mitigated sentence is one of imprisonment, say, after the words "custody in the said jail" "and there to carry into execution the punishment of imprisonment under the said order according to law."

Given under my hand and the seal of the Court, this _____ day of _____, 18____.
(Seal.) (Signature.)

XXXVII.—WARRANT TO LEVY A FINE BY DISTRESS AND SALE.

(See Section 386.)

To (name and designation of the Police-officer or other person or persons who is or are to execute the warrant).

WHEREAS (name and description of the offender) was on the _____ day of _____, 18____, convicted before me of the offence of (mention the offence concisely), and sentenced to pay a fine of rupees _____, and whereas the said (name), although required to pay the said fine, has not paid the same or any part thereof;

This is to authorise and require you to make distress by seizure of any moveable property belonging to the said (name) which may be found within the district of _____; and, if within (state the number of days or hours allowed) next after such distress the said sum shall not be paid (or forthwith), to sell the moveable property distrained, or so much thereof as shall be sufficient to satisfy the said fine, returning this warrant, with an endorsement certifying what you have done under it, immediately upon its execution.

Given under my hand and the seal of the Court, this _____ day of _____, 18____.
(Seal.) (Signature.)

XXXVIII.—WARRANT OF COMMITMENT IN CERTAIN CASES OF CONTEMPT WHEN A FINE IS IMPOSED.

(See Section 480.)

To the Superintendent (or Keeper) of the Jail at _____,

WHEREAS at a Court holden before me on this day (*name and description of the offender*) in the presence (or view) of the Court committed wilful contempt;

And whereas for such contempt the said (*name of offender*) has been adjudged by the Court to pay a fine of rupees _____, or in default to suffer simple imprisonment for the space of (*state the number or months of days*);

This is to authorise and require you, the Superintendent (or Keeper) of the said jail, to receive the said (*name of offender*) into your custody, together with this warrant, and him safely to keep in the said jail for the said period of (*term of imprisonment*), unless the said fine be sooner paid; and on the receipt thereof forthwith to set him at liberty, returning this warrant with an endorsement certifying the manner of its execution.

Given under my hand and the seal of the Court, this _____ day _____, 18 .
(Seal.) _____ (Signature.)

XXXIX.—MAGISTRATE'S OR JUDGE'S WARRANT OF COMMITMENT OF WITNESS REFUSING TO ANSWER.

(See Section 485.)

To (*name and designation of Officer of Court*).

WHEREAS (*name and description*), being summoned (or brought before this Court) as a witness, and this day required to give evidence on an inquiry into an alleged offence, refused to answer a certain question (or certain questions) put to him touching the said alleged offence, and duly recorded, without alleging any just excuse for such refusal, and for his contempt has been adjudged detention in custody for (*term of detention adjudged*);

This is to authorise and require you to take the said (*name*) into custody, and him safely to keep in your custody for the space of _____ days unless in the meantime he shall consent to be examined and to answer the questions asked of him, and on the last of the said days, or forthwith on such consent being known, to bring him before this Court to be dealt with according to law, returning this warrant with an endorsement certifying the manner of its execution.

Given under my hand and the seal of the Court this _____ day of _____, 18 .
(Seal.) _____ (Signature.)

XL.—WARRANT OF IMPRISONMENT ON FAILURE TO PAY MAINTENANCE.

(See Section 488.)

To the Superintendent (or Keeper) of the Jail at _____,

WHEREAS (*name, description and address*) has been proved before me to be possessed of sufficient means to maintain his wife (*name*) [or his child (*name*), who is by reason of (*state the reason*) unable to maintain herself (or himself)] and to have neglected (or refused) to do so, and an order has been duly made requiring the said (*name*) to allow to his said wife (or child) for maintenance the monthly sum of rupees _____; and whereas it has been further proved that the said (*name*) in wilful disregard of the said order has failed to pay rupees _____, being the amount of the allowance for the month (or months) of _____; And thereupon an order was made adjudging him to undergo simple (or rigorous) imprisonment in the said jail for the period of _____;

This is to authorise and require you, the said Superintendent (or Keeper), to receive the said (*name*) into your custody in the said jail, together with this warrant, and there carry the said order into execution according to law, returning this warrant with an endorsement certifying the manner of its execution.

Given under my hand and the seal of the Court, this _____ day of _____, 18 .
(Seal.) _____ (Signature.)

XLI.—WARRANT TO ENFORCE THE PAYMENT OF MAINTENANCE BY DISTRESS AND SALE.

(See Section 488.)

To (name and designation of the Police-officer or other person to execute the warrant).

WHEREAS an order has been duly made requiring (name) to allow to his said wife (or child) for maintenance the monthly sum of rupees _____, and whereas the said (name) in wilful disregard of the said order has failed to pay rupees _____, being the amount of the allowance for the month (or months) of _____;

This is to authorise and require you to make distress by seizure of any moveable property belonging to the said (name) which may be found within the district of _____, and if within (state the number of days or hours allowed) next after such distress the said sum shall not be paid (or forthwith), to sell the moveable property distrained, or so much thereof as shall be sufficient to satisfy the said sum, returning this warrant, with an endorsement certifying what you have done under it, immediately upon its execution.

[illegible]

XLII.—BOND AND BAIL-BOND ON A PRELIMINARY INQUIRY BEFORE A MAGISTRATE.

(See Sections 496 and 499.)

I, (name), of (place), being brought before the Magistrate of (as the case may be), charged with the offence of _____, and required to give security for my attendance in his Court and at the Court of Session, if required, do bind myself to attend at the Court of the said Magistrate on every day of the preliminary inquiry into the said charge, and, should the case be sent for trial by the Court of Session, to be, and appear, before the said Court when called upon to answer the charge against me; and, in case of my making default herein, I bind myself to forfeit to Her Majesty the Queen, Empress of India, the sum of _____ rupees.

Dated this day of 18 .

(Signature.)

I hereby declare myself (or we jointly and severally declare ourselves and each of us) surety (or sureties) for the said (name) that he shall attend at the Court of _____ on every day of _____ the preliminary inquiry into the offence charged against him, and, should the case be sent for trial by the Court of Session, that he shall be, and appear, before the said Court to answer the charge against him, and, in case of his making default therein, I bind myself (or we bind ourselves) to forfeit to Her Majesty the Queen, Empress of India, the sum of _____ rupees

Dated this day of , 18 . (Signature.)

XLIII.—WARRANT TO DISCHARGE A PERSON IMPRISONED ON FAILURE TO GIVE SECURITY.

(See Section 500.)

To the Superintendent (or Keeper) of the Jail at _____ (or other officer in whose custody the person is).

WHEREAS (name and description of prisoner) was committed to your custody under warrant of this Court, dated the _____ day of _____, and has since with his surety (or sureties) duly executed a bond under section 499 of the Code of Criminal Procedure;

This is to authorise and require you forthwith to discharge the said (name) from your custody, unless he is liable to be detained for some other matter.

[illegible]

XLIV.—WARRANT OF ATTACHMENT TO ENFORCE A BOND.

(See Section 514.)

To the Police-officer in charge of the Police-station at

WHEREAS (name, description and address of person) has failed to appear on (mention the occasion) pursuant to his recognizance, and has by such default forfeited to Her Majesty the

Queen, Empress of India, the sum of rupees (*the penalty in the bond*); and whereas the said (*name of person*) has, on due notice to him, failed to pay the said sum or show any sufficient cause why payment should not be enforced against him;

This is to authorise and require you to attach any moveable property of the said (*name*) that you may find within the district of _____, by seizure and detention, and, if the said amount be not paid within three days, to sell the property so attached, or so much of it as may be sufficient to realize the amount aforesaid, and to make return of what you have done under this warrant immediately upon its execution.

Given under my hand and the seal of the Court, this _____ day of _____, 18 .
(Seal). (Signature).

XLV.—NOTICE TO SURETY ON BREACH OF A BOND.

(See Section 514).

To _____ of _____ .

WHEREAS on the _____ day of _____, 18 , you became surety for (*name*) of (*place*) that he should appear before this Court on the _____ day of _____ and bound yourself in default thereof to forfeit the sum of rupees _____ to Her Majesty the Queen, Empress of India; and whereas the said (*name*) has failed to appear before this Court, and by reason of such default you have forfeited the aforesaid sum of rupees _____

You are hereby required to pay the said penalty or show cause, within _____ days from this date, why payment of the said sum should not be enforced against you.

Given under my hand and the seal of the Court, this _____ day of _____, 18 .
(Seal). (Signature).

XLVI.—NOTICE TO SURETY OF FORFEITURE OF BOND FOR GOOD BEHAVIOUR.

(See Section 514).

To _____ of _____ .

WHEREAS on the _____ day of _____, 18 , you became surety by a bond for (*name*) of (*place*) that he would be of good behaviour for the period of _____ and bound yourself in default thereof to forfeit the sum of rupees _____ to Her Majesty the Queen, Empress of India; and whereas the said (*name*) has been convicted of the offence of (*mention the offence concisely*) committed since you became such surety, whereby your security bond has become forfeited;

You are hereby required to pay the said penalty of rupees _____, or to show cause within _____ days why it should not be paid.

Given under my hand and the seal of the Court, this _____ day of _____, 18
(Seal). (Signature).

XLVII.—WARRANT OF ATTACHMENT AGAINST A SURETY.

(See Section 514).

To _____ of _____ .

WHEREAS (*name, description and address*) has bound himself as surety for the appearance of (*mention the condition of the bond*), and the said (*name*) has made default, and thereby forfeited to Her Majesty the Queen, Empress of India, the sum of rupees _____ (*the penalty in the bond*);

This is to authorise and require you to attach any moveable property of the said (*name*) which you may find within the district of _____, by seizure and detention; and, if the said amount be not paid within three days, to sell the property so attached, or so much of it as may be sufficient to realize the amount aforesaid, and make return of what you have done under this warrant immediately upon its execution.

Given under my hand and the seal of the Court, this _____ day of _____, 18 .
(Seal). (Signature).

XLVIII.—WARRANT OF COMMITMENT OF THE SURETY OF AN ACCUSED PERSON ADMITTED TO BAIL.

(See Section 514).

To the Superintendent (or Keeper) of the civil jail at

WHEREAS (*name and description of surety*) has bound himself as a surety for the appearance of *(state the condition of the bond)* and the said (*name*) has therein made default whereby the penalty mentioned in the said bond has been forfeited to Her Majesty the Queen, Empress of India; and whereas the said (*name of surety*) has, on due notice to him, failed to pay the said sum or show any sufficient cause why payment should not be enforced against him, and the same cannot be recovered by attachment and sale of moveable property of his, and an order has been made for his imprisonment in the civil jail for (*specify the period*).

This is to authorise and require you, the said Superintendent (or Keeper), to receive the said (*name*) into your custody with this warrant, and him safely to keep in the said jail for the said (*term of imprisonment*), and to return this warrant with an endorsement certifying the manner of its execution.

Given under my hand and the seal of the Court, this _____ day of _____, 18 ____.
(Seal). (Signature).

XLIX.—NOTICE TO THE PRINCIPAL OF FORFEITURE OF A BOND TO KEEP THE PEACE.

(See Section 514).

To (*name, description and address*).

WHEREAS on the _____ day of _____, 18 __, you entered into a bond not to commit, etc., (*as in the bond*), and proof of the forfeiture of the same has been given before me and duly recorded:

You are hereby called upon to pay the said penalty of rupees _____, or to show cause before me within _____ days why payment of the same should not be enforced against you.

Dated this _____ day of _____, 18 ____.
(Seal). (Signature).

L.—WARRANT TO ATTACH THE PROPERTY OF THE PRINCIPAL ON BREACH OF A BOND TO KEEP THE PEACE.

(See Section 514).

To (*name and designation of Police-officer*) at the Police-station of _____.

WHEREAS (*name and description*) did, on the _____ day of _____, 18 __, enter into a bond for the sum of rupees _____, binding himself not to commit a breach of the peace, etc., (*as in the bond*), and proof of the forfeiture of the said bond has been given before me and duly recorded; and whereas notice has been given to the said (*name*) calling upon him to show cause why the said sum should not be paid, and he has failed to do so or to pay the said sum;

This is to authorise and require you to attach by seizure moveable property belonging to the said (*name*) to the value of rupees _____ which you may find within the district of _____, and, if the said sum be not paid within _____, to sell the property so attached, or so much of it as may be sufficient to realise the same; and to make return of what you have done under this warrant immediately upon its execution.

Given under my hand and the seal of the Court, this _____ day of _____, 18 ____.
(Seal). (Signature).

LI.—WARRANT OF IMPRISONMENT ON BREACH OF A BOND TO KEEP THE PEACE.

(See Section 514).

To the Superintendent (or Keeper) of the civil jail at _____.

WHEREAS proof has been given before me and duly recorded that (*name and description*) has committed a breach of the bond entered into by him to keep the peace, whereby he has forfeited to Her Majesty the Queen, Empress of India, the sum of rupees _____;

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(Passed on the 22nd March 1898.)

ACT No. VI of 1898.

The Indian Post Office Act, 1898.

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An Act to consolidate and amend the Law relating to the Post Office in India.

WHEREAS it is expedient to consolidate and amend the law relating to the Post Office in India; it is hereby enacted as follows :—

CHAPTER I.

PRELIMINARY.

Short title, extent, application and commencement.

1. (1) This Act may be called the Indian Post Office Act, 1898.

(2) It extends to the whole of British India, inclusive of Upper Burma, British Baluchistan, the Santal Parganas and the Pargana of Spiti; and it applies also to—

- (a) all Native Indian subjects of Her Majesty in any place without and beyond British India;
 - (b) all other British subjects within the territories of any Native Prince or Chief in India; and
 - (c) all servants of the Queen, whether British subjects or not, within the territories of any Native Prince or Chief in India.
- (3) It shall come into force on the first day of July 1898.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

- (a) the expression “Director General” means the Director General of the Post Office of India;
- (b) the expression “inland,” used in relation to a postal article, means—
 - (i) posted in British India and addressed to any place in British India or to any place for which a post office is established by the Governor General in Council beyond the limits of British India; or
 - (ii) posted at any post office established by the Governor General in Council beyond the limits of British India and addressed to any place for which any such post office is established or to any place in British India;

- (c) the expression "mail bag" includes a bag, box, parcel or any other envelope or covering in which postal articles in course of transmission by post are conveyed, whether it does or does not contain any such article :
- (d) the expression "mail ship" means a ship employed for carrying mails, pursuant to contract or continuing arrangement, by the Government of India or Her Majesty's Government or the Government of any British possession or foreign country :
- (e) the expression "officer of the Post Office" includes any person employed in any business of the Post Office or on behalf of the Post Office :
- (f) the expression "postage" means the duty chargeable for the transmission by post of postal articles :
- (g) the expression "postage stamp" means any stamp provided by the Governor General in Council for denoting postage or other fees or sums payable in respect of postal articles under this Act, and includes adhesive postage stamps and stamps printed, embossed, impressed or otherwise indicated on any envelope, wrapper, postcard or other article :
- (h) the expression "post office" includes every house, building, room, carriage or place used for the purposes of the Post Office, and every letter-box provided by the Post Office or the reception of postal articles :
- (i) the expression "postal article" includes a letter, postcard, newspaper, book, pattern or sample packet, parcel and every article or thing transmissible by post :
- (j) the expression "Post Master General" includes a Deputy Post Master General or other officer exercising the powers of a Post Master General : and
- (k) the expression "the Post Office" means the department presided over by the Director General.

Meanings of "in course
of transmission by post"
and "delivery."

3. For the purposes of this Act,—

- (a) a postal article shall be deemed to be in course of transmission by post from the time of its being delivered to a post office to the time of its being delivered to the addressee or of its being returned to the sender or otherwise disposed of under Chapter VII :
- (b) the delivery of a postal article of any description to a postman or other person authorised to receive postal articles of that description for the post shall be deemed to be a delivery to a post office : and

the delivery of a postal article at the house or office of the addressee, or to the addressee or his servant or agent or other person considered to be authorised to receive the article according to the usual manner of delivering postal articles to the addressee, shall be deemed to be delivery to the addressee.

CHAPTER II.

PRIVILEGE AND PROTECTION OF THE GOVERNMENT.

4. (1) Wherever within British India posts or postal communications are established by the Governor General in Council, the conveying letters reserved to the Government. Governor General in Council shall have the exclusive privilege of conveying by post, from one place to another, all letters, except in the following cases, and shall also have the exclusive privilege of performing all the incidental services of receiving, collecting, sending, despatching and delivering all letters except in the following cases, that is to say :—

- (a) letters sent by a private friend in his way, journey or travel, to be delivered by him to the person to whom they are directed, without hire, reward or other profit or advantage for receiving, carrying or delivering them ;
- (b) letters solely concerning the affairs of the sender or receiver thereof sent by a messenger on purpose ; and
- (c) letters solely concerning goods or property, sent either by sea or by land to be delivered with the goods or property which the letters concern, without hire, reward or other profit or advantage for receiving, carrying or delivering them :

Provided that nothing in this section shall authorize any person to make a collection of letters excepted as aforesaid for the purpose of sending them otherwise than by post.

(2) For the purposes of this section and Section 5, the expression " letters " includes postcards.

5. Wherever within British India posts or postal communications are established by the Governor General in Council, the following persons are expressly forbidden to collect, carry, tender or deliver letters, or to receive letters for the purpose of carrying or delivering them, although they obtain no hire, reward or other profit or advantage for so doing, that is to say :—

- (a) common carriers of passengers or goods, and their servants or agents, except as regards letters solely concerning goods in their carts or carriages ; and
- (b) owners and masters of vessels sailing or passing on any river or canal in British India, or between any ports or places in British India, and their servants or agents, except as regards letters solely concerning goods on board, and except as regards postal articles received for conveyance under Chapter VIII.

6. The Secretary of State for India in Council shall not incur any liability by reason of the loss, misdelivery or delay of, or damage to, any postal article in course of transmission by post, except in so far as such liability may in express terms be undertaken by the Governor General in Council as hereinafter provided ; and no officer of the Post Office shall incur any liability by reason of any such loss, misdelivery, delay or damage, unless he has caused the same fraudulently or by his wilful act or default.

CHAPTER III.

POSTAGE.

7. (1) The Governor General in Council may, by notification in the *Gazette of India*, fix the rates of postage and other sums to be charged in respect of postal articles sent by the inland post under this Act, and may make rules as to the scale of weights, terms and conditions subject to which the rates so fixed shall be charged :

Power to fix rates of inland postage.

Provided that the highest rate of postage, when prepaid, shall not exceed the rate set forth for each class of postal articles in the first schedule.

(2) Unless and until such notification as aforesaid is issued, the rates set forth in the said schedule shall be the rates chargeable under this Act.

(3) The Governor General in Council may, by notification in the *Gazette of India*, declare what packets may be sent by the inland post as book, pattern and sample packets within the meaning of this Act.

8. The Governor General in Council may, by rule,—

Power to make rules as to payment of postage and fees in certain cases.

- (a) require the prepayment of postage on inland postal articles or any class of inland postal articles, and prescribe the manner in which prepayment shall be made ;
- (b) prescribe the postage to be charged on inland postal articles when the postage is not prepaid or is insufficiently prepaid ;
- (c) provide for the re-direction of postal articles and the transmission by post of articles so re-directed, either free of charge or subject to such further charge as may be specified in the rules ;
- (d) prescribe the fees to be charged for the "express delivery" of postal articles, in addition to, or instead of, any other postage chargeable thereon under this Act.

Explanation.—"Express delivery" means delivery by a special messenger or conveyance.

9. (1) The Governor General in Council may make rules providing for the registration of newspapers for transmission by inland post as registered newspapers.

Power to make rules as to registered newspapers.

(2) For the purpose of such registration, every publication, consisting wholly or in great part of political or other news, or of articles relating thereto or to other current topics, with or without advertisements, shall be deemed a newspaper, subject to the following conditions, namely :—

- (a) that it is published in numbers at intervals of not more than thirty-one days ; and
- (b) that it has a *bonâ fide* list of subscribers.

(3) An extra or supplement to a newspaper, bearing the same date as the newspaper and transmitted therewith, shall be deemed to be part of the newspaper :

Provided that no such extra or supplement shall be so deemed unless it consists wholly or in great part of matter like that of the newspaper, and has the title and date of publication of the newspaper printed at the top of each page.

Explanation.—Nothing in this section or in the rules thereunder shall be construed to render it compulsory to send newspapers by the inland post.

10. (1) Where arrangements are in force with the United Kingdom, or with any British possession or foreign country, for the transmission by post of postal articles between British India and the United Kingdom or such possession or country, the Governor General in Council may, in conformity with the provisions of such arrangements, declare what postage rates and other sums shall be charged in respect of such postal articles, and may make rules as to the scale of weight, terms and conditions subject to which the rates so declared shall be charged.

(2) Unless and until such declaration as aforesaid is made, the existing rates and regulations shall continue in force.

11. (1) The addressee of a postal article on which postage or any other sum chargeable under this Act is due, shall be bound to pay the postage or sum so chargeable on his accepting delivery of the postal article, unless he forthwith returns it unopened;

Liability for payment of postage.

Provided that, if any such postal article appears to the satisfaction of the Post Master General to have been maliciously sent for the purpose of annoying the addressee, he may remit the postage.

(2) If any postal article on which postage or any other sum chargeable under this Act is due, is refused or returned as aforesaid, or if the addressee is dead or cannot be found, then the sender shall be bound to pay the postage or sum due thereon under this Act.

12. If any person refuses to pay any postage or other sum due from him under this Act in respect of any postal article, the sum so due may, on application made by an officer of the Post Office authorized in this behalf by the written order of the Post Master General, be recovered for the use of the Post Office from the person so refusing, as if it were a fine imposed under this Act, by any Magistrate having jurisdiction where that person may for the time being be resident; and the Post Master General may further direct that any other postal article, not being on Her Majesty's service, addressed to that person shall be withheld from him until the sum so due is paid or recovered as aforesaid.

Recovery of postage and other sums due in respect of postal articles.

13. When a postal article, on which any duty of customs is payable, has been received by post from any place beyond the limits of British India, and the duty has been paid by the postal authorities at any customs port or elsewhere, the amount of the duty shall be recoverable as if it were postage due under this Act.

Customs-duty paid by the Post Office to be recoverable as postage.

14. In every proceeding for the recovery of any postage or other sum alleged to be due under this Act in respect of a postal article,—

Post Office marks *prima facie* evidence of certain facts denoted.

(a) the production of the postal article, having thereon the official mark of the Post Office denoting that the article has been refused, or that the addressee is dead or cannot be found, shall be *prima facie* evidence of the fact so denoted, and

- (b) the person from whom the postal article purports to have come, shall, until the contrary is proved, be deemed to be the sender thereof.

15. The official mark on a postal article denoting that any postage or other Official mark to be evidence of amount of postage. sum is due in respect thereof to the Post Office of British India or to the Post Office of the United Kingdom or of any British possession or foreign country, shall be *prima facie* evidence that the sum denoted as aforesaid is so due.

CHAPTER IV.

POSTAGE STAMPS.

16. (1) The Governor General in Council shall cause postage stamps to be provided of such kinds and denoting such values as he may think necessary for the purposes of this Act. Provision of postage stamps and power to make rules as to them.

(2) The Governor-General in Council may make rules as to the supply, sale and use of postage stamps.

(3) In particular and without prejudice to the generality of the foregoing power, such rules may—

- (a) fix the price at which postage stamps shall be sold;
- (b) declare the classes of postal articles in respect of which postage stamps shall be used for the payment of postage or other sums chargeable under this Act;
- (c) prescribe the conditions with regard to perforation, defacement and all other matters subject to which postage stamps may be accepted or refused in payment of postage or other sums;
- (d) regulate the custody, supply and sale of postage stamps;
- (e) declare the persons by whom and the terms and conditions subject to which postage stamps may be sold; and
- (f) prescribe the duties and remuneration of persons selling postage stamps.

17. Postage stamps provided under Section 16 shall be deemed to be stamps issued by Government for the purpose of revenue with-
deemed to be stamps for in the meaning of the Indian Penal Code, XLV of 1860,
the purpose of revenue. and, subject to the other provisions of this Act, shall
be used for the prepayment of postage or other sums chargeable under this Act
in respect of postal articles, except where the Governor General in Council
directs that prepayment shall be made in some other way.

CHAPTER V.

CONDITIONS OF TRANSMISSION OF POSTAL ARTICLES.

18. (1) The Governor General in Council may, by rule, provide for the Re-delivery to sender of postal article in course of transmission by post. re-delivery to the sender, without reference to the consent of the addressee and subject to such conditions (if any) as may be deemed fit, of any postal article in course of transmission by post.

(2) Save as provided by any rules that may be made under sub-section (1), the sender shall not be entitled to recall a postal article in course of transmission by post.

19. (1) Except as otherwise provided by rule and subject such conditions as may be prescribed thereby, no person shall send by post any explosive, dangerous, filthy, noxious or deleterious substance, any sharp instrument not properly protected, or any living creature which is either noxious or likely to injure postal articles in course of transmission by post or any officer of the Post Office.

(2) No person shall send by post any article or thing which is likely to injure postal articles in course of transmission by post or any officer of the Post Office.

Transmission by post of anything indecent, etc., prohibited.

20. No person shall send by post---

(a) any indecent or obscene printing, painting, photograph, lithograph, engraving, book or card, or any other indecent or obscene article, or

(b) any postal article having thereon, or on the cover thereof, any words, marks or designs of an indecent, obscene, seditious, scurrilous, threatening or grossly offensive character.

Power to make rules as to transmission by post of postal articles.

21. (1) The Governor General in Council may make rules as to the transmission by post of postal articles.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may—

(a) provide for the granting receipts for, and the granting and obtaining certificates of posting and delivery of, postal articles, and the sums to be paid, in addition to any other postage, for such receipts and certificates ; and

(b) regulate covers, form dimensions, maximum weight and enclosures, and the use of postal articles, other than letters, for making communications.

(3). Postal articles shall be posted and delivered at such times and in such manner as the Director General may, by order, from time to time appoint.

22. (1) Where the despatch or delivery from a Post Office of letters would be delayed by the despatch or delivery therefrom at the same time of book, pattern or sample packets and parcels, or any of them, such packets or parcels, or any of them, may, subject to such rules as the Governor General in Council may make in this behalf, be detained in the Post Office so long as may be necessary.

(2) Where separate parcel posts are established, parcels may be forwarded and conveyed by them, being detained, if necessary, in the Post Office for that purpose.

23. (1) Any postal article sent by post in contravention of any of the provisions of this Act may be detained, and either returned to the sender or forwarded to destination, in each case charged with such additional postage (if any) as the Governor General in Council may, by rule, direct.

(2) Any officer in charge of a Post Office, or authorized by the Post Master General in this behalf, may open or unfasten any newspaper or any book, pattern or sample packet, in course of transmission by post, which he suspects to have been sent by post in contravention of Section 21, or of any of the provisions of this Act relating to postage.

(3) Notwithstanding anything in sub-section (1),—

(a) any postal article sent by post in contravention of the provisions of Section 19 may, under the authority of the Post Master General, if necessary, be opened and destroyed; and

(b) any postal article sent by post in contravention of the provisions of Section 20 may, under the authority of the Post Master General, be destroyed.

24. Where a postal article, suspected to contain any contraband goods, or anything liable to duty, is received for delivery at a Post Office, the officer in charge of the Post Office shall send a notice in writing to the addressee inviting him to attend, either in person or by agent, within a specified time at the Post Office, and shall in the presence of the addressee or his agent, or if the addressee or his agent fails to attend as aforesaid then in his absence, open and examine the postal article;

Power to deal with postal articles containing goods contraband or liable to duty.

Provided, first, that, if the Director General so directs in the case of any Post Office or class of post offices, the officer in charge of the Post Office shall call in two respectable persons as witnesses before he opens a postal article in the absence of the addressee or his agent :

Provided, secondly, that in all cases a postal article, after being opened under this section, shall be delivered to the addressee, unless it is required for the purpose of any further proceeding under this or any other law or enactment for the time being in force, and that the opening of the postal article and the circumstances connected therewith shall be immediately reported to the Post Master General.

Provided, thirdly, that nothing in this section shall prevent the detention of parcels, received by post from any place beyond the limits of British India, at the customs-port or other place at which they are received, and the opening of parcels so received by the Customs-authorities for the purpose of levying any duty of customs.

25. Where a notification has been published under Section 19 of the Sea Customs Act, VIII of 1878, in respect of any goods of any specified description, any officer of the Post Office empowered in this behalf by the Governor General in Council may search, or cause search to be made, for any such goods in course of transmission by post, and shall deliver all such goods found to such officer as the Governor General in Council may appoint in this behalf, and such goods may be disposed of in such manner as the Governor General in Council may direct.

26. (1) On the occurrence of any public emergency, or in the interest of the public safety or tranquillity, the Governor General in Council, or a Local Government, or any officer specially authorized in this behalf by the Governor General in Council, may, by order in writing, direct that any postal article or class or description of postal articles in course of transmission by post shall be intercepted or detained, or shall be delivered to the Government or to an officer thereof mentioned in the order, to be disposed of in such manner as the Governor General in Council may direct.

(2) If any doubt arises as to the existence of a public emergency, or as to whether any act done under sub-section (1) was in the interest of the public safety or tranquillity, a certificate signed by a Secretary to the Government of India or to the Local Government shall be conclusive proof on the point.

Power to deal with postal articles from abroad bearing fictitious or previously used stamps.

27. (1) Where a postal article is received by post from any place beyond the limits of British India—

- (a) bearing a fictitious postage stamp, that is to say, any facsimile or imitation or representation of a postage stamp; or
- (b) purporting to be prepaid with any postage stamp which has been previously used to prepay any other postal article,

the officer in charge of the Post Office at which the postal article is received shall send a notice to the addressee inviting him to attend either in person or by agent, within a specified time at the Post Office to receive delivery of the postal article.

(2) If the addressee or his agent attends at the Post Office within the time specified in the notice and consents to make known to the officer in charge of the Post Office the name and address of the sender of the postal article, and to re-deliver to the officer aforesaid the portion of the postal article which bears the address and the fictitious or previously used postage stamp, or, if the postal article is inseparable from the stamp, the entire postal article, the postal article shall be delivered to the addressee or his agent.

(3) If the addressee or his agent fails to attend at the Post Office within the time specified in the notice, or, having attended within that time, refuses to make known the name and address of the sender, or to re-deliver the postal article or portion thereof as required by sub-section (2), the postal article shall not be delivered to him, but shall be disposed of in such manner as the Governor General in Council may direct.

Explanation.—For the purposes of this section, the expression “postage stamp” includes any postage stamp for denoting any rate or duty of postage of any part of Her Majesty’s dominions, or of any Native State or foreign country.

CHAPTER VI.

REGISTRATION, INSURANCE AND VALUE-PAYABLE POST.

28. The sender of a postal article may, subject to the other provisions of this Act, have the articles registered at the Post Office at which it is posted, and require a receipt therefor; and the Governor General in Council may, by notification in the *Gazette of India*, direct that, in addition to any postage chargeable under this Act, such further fee as may be fixed by the notification shall be paid on account of the registration of postal articles.

Power to make rules as to registration.

29. (1) The Governor General in Council may make rules as to the registration of postal articles.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may—

- (a) declare in what cases registration shall be required;
- (b) prescribe the manner in which the fees for registration shall be paid; and
- (c) direct that twice the fee for registration shall be levied on the delivery of a postal article required to be registered on which the fee for registration has not been prepaid.

(3) Postal articles made over to the Post Office for the purpose of being registered, shall be delivered, when registered, at such times and in such manner as the Director General may, by order, from time to time appoint.

Insurance of postal articles.

30. The Governor General in Council may, by notification in the *Gazette of India*, direct—

- (a) that any postal article may, subject to the other provisions of this Act, be insured at the Post Office at which it is posted, against the risk of loss or damage in course of transmission by post, and that a receipt therefor shall be granted to the person posting it; and
- (b) that, in addition to any postage and fees for registration chargeable under this Act, such further fee as may be fixed by the notification shall be paid on account of the insurance of postal articles.

31. The Governor General in Council may, by notification in the *Gazette of India*, declare in what cases insurance shall be required, and direct that any postal article containing anything required to be insured, which has been posted without being insured, shall be returned to the sender or shall be delivered to the addressee, subject to the payment of such special fee as may be fixed by the notification:

Power to require insurance of postal articles.

Provided that the levy of such special fee as aforesaid shall not impose any liability upon the Secretary of State for India in Council in respect of the postal article.

Power to make rules as to insurance.

32. (1) The Governor General in Council may make rules as to the insurance of postal articles.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may—

- (a) declare what classes of postal articles may be insured under Section 30;
- (b) fix the limit of the amount for which postal articles may be insured; and
- (c) prescribe the manner in which the fees for insurance shall be paid.

(3) Postal articles made over to the Post Office for the purpose of being insured, shall be delivered, when insured, at such places and times and in such manner as the Director General may, by order, from time to time appoint.

33. Subject to such conditions and restrictions as the Governor General in Council may, by rule, prescribe, the Secretary of State for India in Council shall be liable to pay compensation, not exceeding the amount for which a postal article has been insured, to the sender thereof for the loss of the postal article or its contents, or for any damage caused to it in course of transmission by post:

Liability in respect of postal articles insured.

Provided that the compensation so payable shall in no case exceed the value of the article lost or the amount of the damage caused.

34. The Governor General in Council may, by notification in the *Gazette of India*, direct that, subject to the other provisions of this Act and to the payment of fees at such rates as may be fixed by the notification, a sum of money specified in writing at the time of posting by the sender of a postal article shall

Transmission by post of value-payable postal articles.

be recoverable on the delivery thereof from the addressee, and that the sum, so recovered, shall be paid to the sender :

Provided that the Secretary of State for India in Council shall not incur any liability in respect of the sum specified for recovery, unless and until that sum has been received from the addressee.

Explanation.—Postal articles sent in accordance with the provisions of this section may be described as “value-payable” postal articles.

Power to make rules as to value-payable postal articles. 35. (1) The Governor-General in Council may make rules as to the transmission by post of value-payable postal articles.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may—

- (a) declare what classes of postal articles may be sent as value-payable postal articles ;
- (b) direct that no postal article shall be so sent unless the sender declares that it is sent in execution of a *bond fide* order received by him ;
- (c) limit the value to be recovered on the delivery of any value-payable postal article ; and
- (d) prescribe the form of declaration to be made by the senders of value-payable postal articles, and the time and manner of the payment of fees.

(3) Postal articles shall be made over to the Post Office for the purpose of being sent as “value payable,” and shall be delivered, when so sent, at such times and in such manner as the Director General may by order from time to time appoint.

36. (1) Where arrangements are in force with the United Kingdom, or with any British possession, Native State or foreign country, for the transmission by post of registered, insured or value-payable postal articles between British India and the United Kingdom or such possession, State or country, the Governor General in Council may make rules to give effect to such arrangements.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may prescribe—

- (a) the form of declaration to be made by the senders of such postal articles as aforesaid ; and
- (b) the fees to be charged in respect thereof.

CHAPTER VII.

UNDELIVERED POSTAL ARTICLES.

37. (1) The Governor-General in Council may make rules as to the disposal of postal articles which for any reason cannot be delivered (hereinafter referred to as “undelivered postal articles”).

Power to make rules as to disposal of undelivered postal articles.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may—

- (a) prescribe the period during which undelivered postal articles at a Post Office shall remain in that office ; and

- (b) provide for the publication of lists of undelivered postal articles, or of any class of undelivered postal articles.

(3) Every undelivered postal article, after being detained at a Post Office for the period prescribed by rule under the foregoing provisions of this section, shall be either forwarded, free of further charge, to the Post Office at which it was posted, for return to the sender, or sent to the office of the Post Master General.

Disposal of undelivered postal articles at office of Post Master General. 38. (1) Every postal article received at the office of the Post Master General under sub-section (3) of Section 37 shall be dealt with as follows:—

- (a) If practicable, it shall be re-directed and forwarded by post to the addressee; or
- (b) If it cannot be re-directed and forwarded as aforesaid, it shall be opened by some officer, appointed by the Post Master General in this behalf and bound to secrecy, in order to ascertain the name and address of the sender.

(2) If the name and address of the sender are so ascertained, it shall be returned by post to the sender, free of further charge or subject to such further charge as the Governor-General in Council may, by rule, direct.

39. Undelivered postal articles, which cannot be disposed of under the foregoing provisions, shall be detained in the office of the Post Master General for such further period (if any), and shall be dealt with in such manner, as the Governor General in Council may, by rule, direct:

Provided that—

- (a) letters and postcards shall be destroyed;
- (b) money or saleable property, not being of a perishable nature, found in any undelivered postal article, shall be detained for a period of one year in the office of the Post Master General, and, if on the expiration of that period no person has established his right thereto, shall, if money, be credited to the Post Office, and, if saleable property, be sold, the sale proceeds being credited to the Post Office.

CHAPTER VIII.

SHIP LETTERS.

40. The master of a ship, not being a mail ship about to depart from any port in British India to any port within, or any port or place beyond, British India, shall receive on board any mail bag tendered to him by any officer of the Post Office for conveyance, granting a receipt therefor in such form as the Governor General in Council may, by rule, prescribe, and shall, without delay, deliver the same at the port or place of destination.

41. (1) The master of a ship arriving at any port in British India shall, without delay, cause every postal article or mail bag on board, which is directed to that port and is within the exclusive privilege conferred on the Governor General in Council by Section 4, to be delivered either at the Post Office at that port or to some officer of the Post Office authorised in this behalf by the Post Master General.

(2) If there is on board any postal article or mail bag which is directed to any other place within British India and is within the exclusive privilege aforesaid, the master shall, without delay, report the fact to the officer in charge of the Post Office at the port of arrival, and act according to the directions he may receive from such officer, and the receipt of such officer shall discharge him from all further responsibility in respect of the postal article or mail bag.

42. The Governor General in Council may, by notification in the *Gazette of India*, declare what gratuities shall be allowed to masters of ships, not being mail ships, in respect of postal articles received by them for conveyance on behalf of the Post Office; and the master of a ship, not being a mail ship, about to leave any port in British India as aforesaid, shall, if he receives on board a mail bag for conveyance, be entitled to demand and obtain immediately the amount of the gratuity payable under this section in respect of the mail bag and its contents.

CHAPTER IX.

MONEY ORDERS.

Power to maintain money order system and to make rules as to remittances thereby.

43. (1) The Governor General in Council may provide for the remitting of small sums of money through the Post Office by means of money orders, and may make rules as to such money orders.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may prescribe—

- (a) the limit of amount for which money orders may be issued;
- (b) the period during which money orders shall remain current; and
- (c) the rates of commission or the fees to be charged on money orders or in respect thereof.

44. (1) Subject to such conditions as the Governor General in Council may, by rules made under Section 43, prescribe in respect of the levy of additional rates of commission or fees or any other matters, a person remitting money through the Post Office by means of a money order may require that the amount of the order, if not paid to the payee, be repaid to him, or be paid to such person other than the original payee as he may direct.

(2) If neither the payee nor the remitter of a money order can be found, and if within the period of one year from the date of the issue of the order no claim is made by such payee or remitter, the amount of such order shall not be claimable from the Government.

45. The Governor General in Council may authorise the issue, in such form as may be suitable, of money orders, to be called postal orders or by such other designation as may be deemed appropriate, for certain fixed amounts, and may make rules as to the rates of commission to be charged thereon, and the manner in which, and conditions subject to which, they may be issued, paid and cancelled:

Provided that no such order shall be issued for an amount in excess of ten rupees.

46. (1) Where arrangements are in force with the United Kingdom, or with any British possession, Native State, or foreign country, for the issue and payment through the Post Office of money orders between British India and the United Kingdom or such possession, State or country, the Governor General in Council may make rules to give effect to such arrangements.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may prescribe—

- (a) the manner in which, and the conditions subject to which, such orders may be issued and paid in British India; and
- (b) the rates of commission to be charged thereon.

47. If any person, without reasonable excuse, the burden of proving which shall lie on him, neglects or refuses to refund—

Recovery of money order paid to the wrong person.

- (a) any amount paid to him in respect of a money order by an officer of the Post Office in excess of what ought to have been paid to him in respect thereof, or
- (b) the amount of a money order paid by an officer of the Post Office to him instead of to some other person to whom it ought to have been paid,

such amount shall be recoverable by an officer of the Post Office authorised by the Post Master General in this behalf from the person so neglecting or refusing as if it were an arrear of land-revenue due from him.

48. No suit or other legal proceeding shall be instituted against the Secretary of State for India in Council or any officer of the Post Office in respect of—

Exemption from liability in respect of money orders.

- (a) anything done under any rules made by the Governor General in Council under this chapter; or
- (b) the wrong payment of a money order caused by incorrect or incomplete information, given by the remitter as to the name and address of the payee, provided that, as regards incomplete information, there was reasonable justification for accepting the information as a sufficient description for the purpose of identifying the payee; or
- (c) the payment of any money order being refused or delayed by, or on account of, any accidental neglect, omission or mistake, by, or on the part of, an officer of the Post Office, or for any other cause whatsoever, other than the fraud or wilful act or default of such officer; or
- (d) any wrong payment of a money order after the expiration of one year from the date of the issue of the order.

CHAPTER X.

PENALTIES AND PROCEDURE.

Offences by Officers of the Post Office.

Penalty for misconduct of person employed to carry or deliver mail bags or postal articles.

49. Whoever, being employed to carry or deliver any mail bag or any postal article in course of transmission by post,—

- (a) is in a state of intoxication while so employed, or
- (b) is guilty of carelessness or other misconduct, whereby the safety of any such mail bag or postal article as aforesaid is endangered, or
- (c) loiters or makes delay in the conveyance or delivery of any such mail bag or postal article as aforesaid, or
- (d) does not use due care and diligence safely to convey or deliver any such mail bag or postal article as aforesaid,

shall be punishable with fine which may extend to fifty rupees.

50. Whoever, being employed to carry or deliver any mail bag or any postal article in course of transmission by post, voluntarily withdraws from the duties of his office without permission or without having given one month's previous notice in writing, shall be punishable with imprisonment which may extend to one month, or with fine which may extend to fifty rupees, or with both.

Penalty for voluntary withdrawal from duty, without permission or notice, of person employed to carry or deliver mail bags or postal articles.

51. Whoever, being employed to carry or deliver any postal article in course of transmission by post and required while so employed to keep any register, makes, or causes or suffers to be made, any false entry in the register with intent to induce the belief that he has visited a place, or delivered a postal article, which he has not visited or delivered, shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to one hundred rupees, or with both.

Penalty for making false entry in register kept by person employed to carry or deliver postal articles.

52. Whoever, being an officer of the Post Office, commits theft in respect of, or dishonestly misappropriates, or, for any purpose whatsoever, secretes, destroys or throws away, any postal article in course of transmission by post or anything contained therein, shall be punishable with imprisonment for a term which may extend to seven years, and shall also be punishable with fine.

Penalty for theft, dishonest misappropriation, secretion, destruction, or throwing away, of postal articles.

53. Whoever, being an officer of the Post Office, contrary to his duty, opens, or causes or suffers to be opened, any postal article in course of transmission by post, or wilfully detains or delays, or causes or suffers to be detained or delayed, any such postal article, shall be punishable with imprisonment for a term which may extend to two years, or with fine, or with both :

Penalty for opening, detaining or delaying postal articles.

Provided that nothing in this section shall extend to the opening, detaining or delaying of any postal article under the authority of this Act, or in obedience to the order in writing of the Governor General in Council or the direction of a competent Court.

Penalty for fraud in connection with official marks and for receipt of excess postage.

54. Whoever, being an officer of the Post Office,—

- (a) fraudulently puts any wrong official mark on a postal article, or
- (b) fraudulently alters, removes or causes to disappear any official mark which is on a postal article, or,

(c) being entrusted with the delivery of any postal article, knowingly demands or receives any sum of money in respect of the postage thereof which is not chargeable under this Act,

shall be punishable with imprisonment for a term which may extend to two years, and shall also be punishable with fine.

55. Whoever, being an officer of the Post Office entrusted with the preparing or keeping of any document, fraudulently prepares the document incorrectly, or alters or secretes or destroys the document, shall be punishable with imprisonment for a term which may extend to two years, and shall also be punishable with fine.

56. Whoever, being an officer of the Post Office, sends by post, or puts into any mail bag, any postal article upon which postage has not been paid or charged in the manner prescribed by this Act, intending thereby to defraud the Government of the postage on such postal article, shall be punishable with imprisonment for a term which may extend to two years, and shall also be punishable with fine.

57. (1) Whoever, being an officer of the Post Office employed in any place in India beyond the limits of British India in which posts are established by the Governor General in Council, or being appointed to sell postage stamps in any such place, commits therein an offence punishable under this Act, shall be punishable either in the place where the offence was committed by any Court or officer duly empowered by the Governor General in Council to take cognizance of offences committed in that place, or in any part of British India by any Court of competent jurisdiction as if the offence had been committed in that part.

(2) The provisions of Section 188 of the Code of Criminal Procedure, V of 1898, shall not apply to any offence referred to in this section.

Other Offences.

Penalty for contravention of Section 4

58. Whoever—

- (a) conveys, otherwise than by post, a letter within the exclusive privilege conferred on the Governor General in Council by Section 4, or
- (b) performs any service incidental to conveying, otherwise than by post, any letter within the exclusive privilege aforesaid, or
- (c) sends, or tenders or delivers in order to be sent, otherwise than by post, a letter within the exclusive privilege aforesaid, or
- (d) makes a collection of letters excepted from the exclusive privilege aforesaid for the purpose of sending them otherwise than by post,

shall be punishable with fine which may extend to fifty rupees for every such letter.

(2) Whoever, having already been convicted of an offence under this section, is again convicted thereunder, shall, on every such subsequent conviction, be punishable with fine which may extend to five hundred rupees.

59. (1) Whoever, in contravention of the provisions of Section 5, carries, receives, tenders or delivers letters, or collects letters, shall be punishable with fine which may extend to fifty rupees for every such letter.

Penalty for contravention of Section 5.

(2) Whoever, having already been convicted of an offence under this section, is again convicted thereunder, shall, on every such subsequent conviction, be punishable with fine which may extend to five hundred rupees.

Penalty for breach of rules under Section 16. 60. Whoever, being appointed to sell postage stamps,—

(a) takes from any purchaser for any postage stamp or quantity of postage stamps a price higher than that fixed by any rule made under Section 16, sub-section (3), clause (a), shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to two hundred rupees, or with both; or

(b) commits a breach of any other rule made under Section 16, shall be punishable with fine which may extend to two hundred rupees.

61. (1) Whoever, in contravention of the provisions of Section 19 or Section 20 sends, or tenders or makes over in order to be sent, by post any postal article or anything, shall be punishable with imprisonment for a term which may extend to one year, or with fine, or with both.

Penalty for contravention of Section 19 or 20.

(2) The detention in the Post Office of any postal article on the ground of its having been sent in contravention of the provisions of Section 19 or Section 20, shall not exempt the sender from any proceedings which might have been taken if the postal article had been delivered in due course of post.

62. Whoever places in or against any letter-box provided by the Post Office for the reception of postal articles any fire, match or light, any explosive, dangerous, filthy, noxious or deleterious substance, or any fluid, or commits a nuisance in or against any such letter-box, or does anything likely to injure any such letter-box or its appurtenances or contents, shall be punishable with imprisonment for a term which may extend to one year, or with fine, or with both.

Penalty for defiling or injuring Post Office letter-boxes.

63. Whoever, without due authority, affixes any placard, advertisement, notice, list, document, board or other thing in or on, or paints, tars or in any way disfigures any Post Office or any letter-box provided by the Post Office for the reception of postal articles, shall be punishable with fine which may extend to fifty rupees.

Penalty for affixing without authority thing to, or painting, tarring or disfiguring, Post Office or Post office letter-box.

64. Whoever, being required by this Act to make a declaration in respect of any postal article to be sent by post or the contents or value thereof, makes in his declaration any statement which he knows, or has reason to believe, to be false, or does not believe to be true, shall be punishable with fine which may extend to two hundred rupees, and, if the false declaration is made for the purpose of defrauding the Government, with fine which may extend to five hundred rupees.

Penalty for making false declaration.

Penalty for master of ship failing to comply with the provisions of Section 40 or 41.

65. Whoever, being the master of a ship,—

(a) fails to comply with the provisions of Section 40, or,

- (b) without reasonable excuse, the burden of proving which shall lie on him, fails to deliver any postal article or mail bag or to comply with the directions of the officer in charge of the Post Office at a port of arrival, as required by Section 41,

shall be punishable with fine which may extend to one thousand rupees.

66. (1) Whoever, being either the master of a ship arriving at any port in British India or any one on board, knowingly has in his baggage or in his possession or custody, after the postal articles on board or any of them have been sent to the Post Office at the port of arrival, any postal article within the exclusive privilege conferred on the Governor General in Council by Section 4, shall be punishable with fine which may extend to fifty rupees for every such postal article as aforesaid.

(2) Whoever, being such master or other person as aforesaid, detains any such postal article as aforesaid after demand made for it by an officer of the Post Office, shall be punishable with fine which may extend to one hundred rupees for every such postal article.

67. Whoever, except under the authority of this Act, or in obedience to the order in writing of the Governor General in Council, or the direction of a competent Court, detains the mails or any postal article in course of transmission by post, or on any pretence opens a mail bag in course of transmission by post, shall be punishable with fine which may extend to two hundred rupees :

Provided that nothing in this section shall prevent the detention of an officer of the Post Office carrying the mails, or any postal article in course of transmission by post, on a charge of having committed an offence declared to be cognizable by the Code of Criminal Procedure, V of 1898, or any other law for the time being in force.

68. Whoever fraudulently retains, or wilfully secretes or makes away with, or keeps or detains, or, when required by an officer of the Post Office, neglects or refuses to deliver up, any postal article in course of transmission by post which ought to have been delivered to any other person, or a mail bag containing a postal article, shall be punishable with imprisonment for a term which may extend to two years, and shall also be punishable with fine.

69. Whoever, not being an officer of the Post Office, wilfully and maliciously, with intent to injure any person, either opens or causes to be opened any letter which ought to have been delivered, or does any act whereby the due delivery of a letter to any person is prevented or impeded, shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both :

Provided that nothing in this section shall apply to a person who does any act to which the section applies, if he is a parent, or in the position of a parent or guardian, of the addressee, and the addressee is a minor or a ward.

General.

70. Whoever abets the commission of any offence punishable under this Act, or attempts to commit any offence so punishable, shall be punishable with the punishment provided for that offence.

71. In every prosecution for an offence in respect of a mail bag or of any postal article sent by post, it shall be sufficient, for the purpose of the charge, to describe the mail bag or postal article as being the property of the Post Office, and it shall not be necessary to prove that the mail bag or postal article was of any value.

72. No Court shall take cognizance of an offence punishable under any of the provisions of Sections 51, 53, 54, clauses (a) and (b), 55, 56, 58, 59, 61, 64, 65, 66 and 67 of this Act, unless upon complaint made by order of, or under authority from, the Director General or a Post Master General.

CHAPTER XI.

SUPPLEMENTAL.

Zamindari and other district posts.

73. (1) The Governor General in Council may make rules for the management of any zamindari or other district post.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may declare what portions of this Act shall be applicable to zamindari and other district posts and to the persons employed in connection therewith.

General power to make rules and provisions as to rules under Act.

74. (1) In addition to the powers hereinbefore conferred, the Governor General in Council may make rules to carry out any of the purposes and objects of this Act.

(2) In making any rule under this Act, the Governor General in Council may direct that a breach of it shall be punishable with fine which may extend to fifty rupees.

(3) All rules made by the Governor General in Council under this Act shall be published in the *Gazette of India* and, on such publication, shall have effect as if enacted by this Act.

75. The Governor General in Council may, by notification in the *Gazette of India*, authorize either absolutely or subject to conditions, the Director General to exercise any of the powers conferred upon the Governor General in Council by this Act, other than a power to make rules.

76. The enactments mentioned in the second schedule are repealed to the extent specified in the fourth column thereof.

Repeal.

77. Nothing in this Act shall derogate from or affect the provisions of the East India Company Act, (21 Geo. 3, c. 70) 1780, or any enactment amending or extending the same.

Saving.

THE FIRST SCHEDULE.

INLAND POSTAGE RATES.

(See Section 7).

LETTERS.

For a weight not exceeding half a tola	...	...	...	Half an anna.
For a weight not exceeding one tola	...	...	...	One anna.
For every tola or fraction thereof exceeding one tola	...	...	...	One anna.

POSTCARDS.

Single	...	...	...	...	...	...	...	...	...	Quarter of an anna.
Reply	...	...	...	...	...	...	...	...	...	Half an anna.

BOOK, PATTERN AND SAMPLE PACKETS.

For every ten tolas or fraction thereof	...	...	...	...	Half an anna.
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NEWSPAPERS.

For a weight not exceeding three tolas	...	...	...	...	Quarter of an anna.
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REGISTERED NEWSPAPERS.

For a weight not exceeding twenty tolas	...	...	...	...	Half an anna.
For every twenty tolas or fraction thereof exceeding twenty tolas,	...	...	...	...	Half an anna.

PARCELS.

For a weight not exceeding twenty tolas	...	...	...	...	Two annas.
For a weight not exceeding forty tolas	...	...	...	...	Four annas.
For every additional forty tolas or fraction thereof exceeding forty tolas	...	...	...	...	Four annas.

THE SECOND SCHEDULE.

ENACTMENTS REPEALED.

(See Section 76.)

Year.	No.	Short title.	Extent of repeal.
1866	XIV	The Indian Post Office Act, 1866	The whole.
1882	III	The Seditious Publications Act, 1882	So much as is unrepealed.
1895	III	The Indian Criminal Law Amendment Act, 1895.	Section 7.
1896	XVI	The Indian Post Office Act (1866) Amendment Act, 1896.	The whole.
1897	XIV	The Indian Short Titles Act, 1897	So much as relates to Act XVI of 1896.

(Passed on the 28th March 1898).

ACT No. VII of 1898.

An Act to further amend the Petroleum Act, 1886.

WHEREAS it is expedient to further amend the Petroleum Act, XII of 1886 ; It is hereby enacted as follows :—

Short title and commencement.

1. (1) This Act may be called the Petroleum Act, 1898 ; and

(2) It shall come into force at once.

Substitution of new definition of "petroleum" in Section 3, Act XII, 1886.

2. In Section 3 of the Petroleum Act, XII of 1886, for clause (1) the following shall be substituted, namely :—

'(1) "petroleum" includes also—

- (a) the liquids commonly known by the names of rock oil, Rangoon oil, Burma oil, kerosine, paraffin oil, mineral oil, petroline, gasoline, benzol, beuzoline and benzine ;
- (b) any inflammable liquid which is made from petroleum, coal, schist, shale, peat or any other bituminous substance, or from any product of petroleum ; and
- (c) any liquid or viscous mixture having in its composition any of the liquids aforesaid :

but it does not include any oil ordinarily used for lubricating purposes and having its flashing point at or above two hundred degrees of Fahrenheit's thermometer.'

Addition of new sub-sections to Section 4, Act XII, 1886.

3. To Section 4 of the said Act the following sub-sections shall be added, namely :—

"(3) The Governor-General in Council may, by notification in the official Gazette, alter or add to the schedule to this Act by prescribing new or varied tests, and directions for preparing and using them ; and all references in this Act to the schedule, when altered or added to, shall be construed as referring to the schedule as so altered or added to for the time being.

(4) The provisions of Section 23 of the General Clauses Act, X of 1897, shall apply to notifications under sub-section (3) as if they were rules or orders required to be made after previous publication."

(Passed on the 15th July 1898).

ACT No. VIII of 1898.

An Act to amend the Indian Paper Currency Act, 1898.

WHEREAS it is expedient to amend the Indian Paper Currency Act, II of 1898 ; It is hereby enacted as follows :—

Short title and commencement.

1. (1) This Act may be called the Indian Paper Currency Act Amendment Act, 1898 ; and

(2) It shall come into force at once.

2. Sub-section (3) of section 1 of the Indian Paper Currency Act, II of 1898, is hereby repealed, and the following is substituted therefor, namely :—

"(3) It shall remain in force for two years and six months from the commencement thereof."

(Passed on the 12th August 1898.)

ACT No. IX of 1898.

An Act to make better provision for the regulation of the importation of live-stock.

WHEREAS it is expedient to make better provision for the regulation of the importation of live-stock which is liable to be affected by infectious or contagious disorders ; It is hereby enacted as follows :—

Short title, local extent and commencement. 1. (1) This Act may be called the Live-stock Importation Act, 1898.

(2) It extends to the whole of British India ; and

(3) It shall come into force at once.

Definitions. 2. In this Act, unless there is anything repugnant in the subject or context,—

(a) the expression “ infectious or contagious disorders ” includes tick-pest, anthrax, glanders, farcy, scabies and any other disease or disorder which may be specified by the Governor-General in Council by notification in the *Gazette of India* ; and

(b) “ live-stock ” includes horses, kine, camels, sheep and any other animal which may be specified by the Governor-General in Council by notification in the *Gazette of India*.

3. (1) The Governor-General in Council may, by notification in the *Gazette of India*, regulate, restrict or prohibit in such manner and to such extent as he may think fit, the bringing or taking, by sea or land, into British India or any specified place therein, of any live-stock which may be liable to be affected by infectious or contagious disorders, and of any fodder, dung, stable-litter, clothing, harness or fittings appertaining to live-stock or that may have been incontact therewith.

(2) A notification under sub-section (1) shall operate as if it had been issued under Section 19 of the Sea Customs Act, VIII of 1878, and the officers of customs at every port shall have the same powers in respect of any live-stock or thing, with regard to the importation of which such a notification has been issued, and the vessel containing the same, as they have for the time being in respect of any article the importation of which is regulated, restricted or prohibited by the law relating to sea customs and the vessel containing the same ; and the enactments for the time being in force relating to sea customs or any such article or vessel shall apply accordingly.

4. (1) The Local Government may, subject to the control of the Governor-General in Council, make rules for the detention, inspection, disinfection or destruction of imported live-stock, and of fodder, dung, stable-litter, clothing, harness or fittings appertaining to imported live-stock or that may have been in contact therewith, and for regulating the powers and duties of the officers whom it may appoint in this behalf.

(2) In making any rule under this section, the Local Government may direct that a breach thereof shall be punishable with fine which may extend to one thousand rupees.

5. No suit, prosecution or other legal proceeding shall lie against any person for anything in good faith done, or intended to be done, under this Act.

Protection to persons acting under Act.

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**LEGISLATIVE DEPARTMENTAL
ORDERS
(PUNJAB GOVERNMENT), 1898.**

LEGISLATIVE DEPARTMENT (PUNJAB GOVERNMENT).

(Received the assent of His Honour the Lieutenant-Governor of the Punjab on the 11th May 1898, and that of His Excellency the Viceroy and Governor-General on the 15th July 1898).

PUNJAB ACT No. I of 1898. THE PUNJAB GENERAL CLAUSES ACT, 1898.

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An Act to shorten the language of Acts and for other matters.

WHEREAS it is expedient to shorten the language used in Acts made by the Lieutenant-Governor of the Punjab in Council, and to make certain provisions for the construction of, and other matters relating to, such Acts :

It is hereby enacted as follows:—

Preliminary.

Short title and commencement.

1. (1) This Act may be called the Punjab General Clauses Act, 1898; and

- (2) It shall come into force at once.

General Definitions.

2. In this Act, and in all Acts of the Lieutenant-Governor of the Punjab in Council, unless there is anything repugnant in the subject or context,—

Definitions.

- (1) "abet," with its grammatical variations and cognate expressions, shall have the same meaning as in the Indian Penal Code:

"Abet."

- (2) "act," used with reference to an offence or a civil wrong, shall include a series of acts, and words which refer to acts done extend also to illegal

"Act."

omissions :

- (3) "affidavit" shall include affirmation and declaration in the case of persons by law allowed to affirm or declare instead of swearing :

"Affidavit."

- (4) "barrister" shall mean a barrister of England or Ireland, or a member of the Faculty of Advocates in Scotland :

"Barrister."

- (5) "British India" shall mean all territories and places within Her Majesty's dominions which are for the time being governed by Her Majesty through the Governor-General of India or through any Governor or other officer subordinate to the Governor-General of India :

"British India."

- (6) "British possession" shall mean any part of Her Majesty's dominions, exclusive of the United Kingdom, and, where parts of those dominions are under both a central and a local legislature, all parts under the central legislature shall, for the purposes of this definition, be deemed to be one British possession :

"British possession."

- (7) "Chapter" shall mean a Chapter of the Punjab Act in which the word occurs :
"Chapter."
- (8) "Chief Court" shall, for the purposes of all Punjab Acts for the time being in force, mean the Chief Court of the Punjab or the highest Court of original, appellate or revisional jurisdiction in the Punjab :
"Chief Court."
- (9) "Collector" shall mean the chief officer in charge of the revenue administration of a district, and shall include a Deputy Commissioner :
"Collector."
- (10) "Colony" shall mean any part of Her Majesty's dominions, exclusive of the British Islands and of British India, and, where parts of those dominions are under both a central and a local legislature, all parts under the central legislature shall, for the purposes of this definition, be deemed to be one colony :
"Colony."
- (11) "commencement," used with reference to a Punjab Act, shall mean the day on which the Act comes into force :
"Commencement."
- (12) "Commissioner" shall mean the chief officer in charge of the revenue and general administration of a division :
"Commissioner."
- (13) "consular officer" shall include consul-general, consul, vice-consul, consular agent, pro-consul, and any person for the time being authorized to perform the duties of consul-general, consul, vice-consul or consular agent :
"Consular officer."
- (14) "Deputy Commissioner" shall mean the chief officer in charge of the general administration of a district :
"Deputy Commissioner."
- (15) "District Judge" shall mean the Judge of a District Court and shall include a principal Civil Court of original jurisdiction in a district :
"District Judge."
- (16) "document" shall include any matter written, expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, which is intended to be used, or which may be used, for the purpose of recording that matter :
"Document."
- (17) "enactment" shall include any provision contained in any Punjab Act :
"Enactment."
- (18) "father," in the case of any one whose personal law permits adoption, shall include an adoptive father :
"Father."
- (19) "Financial Commissioner" shall mean the Financial Commissioner of the Punjab for the time being :
"Financial Commissioner."
- (20) "financial year" shall mean the year commencing on the first day of April :
"Financial year."
- (21) "Gazette" shall mean the *Punjab Gazette* published under the authority of the Lieutenant-Governor of the Punjab :
"Gazette."

- (22) a thing shall be deemed to be done in "good faith" where it is in fact done honestly, whether it is done negligently or not:
 "Good faith."
- (23) "Government" or "the Government" shall include the Local Government as well as the Government of India:
 "Government."
- (24) "Government of India" shall mean the Governor-General in Council, or, during the absence of the Governor-General from his Council, the President in Council, or the Governor-General alone, as regards the powers which may be lawfully exercised by them or him respectively:
 "Government of India."
- (25) "Her Majesty" or "the Queen" shall include Her successors:
 "Her Majesty" or "the Queen."
- (26) "immoveable property" shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth:
 "Immoveable property."
- (27) "imprisonment" shall mean imprisonment of either description as defined in the Indian Penal Code:
 "Imprisonment."
- (28) "India" shall mean British India, together with any territories of any Native Prince or Chief under the suzerainty of Her Majesty exercised through the Governor-General of India or through any Governor or other officer subordinate to the Governor-General of India:
 "India."
- (29) "India Act" shall mean an Act made by the Governor-General of India in Council:
 "India Act."
- (30) "local authority" shall mean a municipal committee, district board, body of port commissioners or other authority legally entitled to, or entrusted by the Government with, the control or management of a municipal or local fund:
 "Local authority."
- (31) "Local Government" shall mean the Lieutenant-Governor of the Punjab:
 "Local Government."
- (32) "Magistrate" shall include every person exercising all or any of the powers of a Magistrate under the Code of Criminal Procedure for the time being in force:
 "Magistrate."
- (33) "master," used with reference to a ship, shall mean any person (except a pilot or harbour master) having for the time being control or charge of the ship:
 "Master" (of a ship).
- (34) "month" shall mean a month reckoned according to the British calendar:
 "Month."
- (35) "moveable property" shall mean property of every description, except immoveable property:
 "Moveable property."
- (36) "notification" shall mean a notification published under proper authority in the Gazette:
 "Notification."

XLV of 1890.

X of 1892.

- (37) "oath" shall include affirmation and declaration in the case of persons by law allowed to affirm or declare instead of swearing:
 "Oath."
- (38) "offence" shall mean any act or omission made punishable by any law for the time being in force:
 "Offence."
- (39) "Part" shall mean a Part of the Punjab Act in which the word occurs:
 "Part."
- (40) "person" shall include any company or association or body of individuals, whether incorporated or not:
 "Person."
- (41) "Political Agent" shall include—
 "Political Agent."
- (a) the principal officer representing the Government in any territory or place beyond the limits of British India, and
- (b) any officer of the Government of India or of any Local Government appointed by the Government of India or the Local Government to exercise all or any of the powers of a Political Agent for any place not forming part of British India under the law for the time being in force relating to foreign jurisdiction and extradition:
- (42) "Privy Council" shall mean the Lords and others for the time being of Her Majesty's Most Honourable Privy Council:
 "Privy Council."
- (43) "Province" shall mean the territories for the time being administered by any Local Government:
 "Province."
- (44) "public nuisance" shall mean a public nuisance as defined in the Indian Penal Code:
 "Public nuisance."
- (45) "Punjab" shall mean the territories for the time being administered by the Lieutenant-Governor of the Punjab:
 "Punjab."
- (46) "Punjab Act" shall mean an Act made by the Lieutenant-Governor of the Punjab in Council under the Indian Councils Acts, 1861 and 1892:
 "Punjab Act."
- (47) "registered," used with reference to a document, shall mean registered in British India under the law for the time being in force for the registration of documents:
 "Registered."
- (48) "rule" shall mean a rule made in exercise of a power conferred by any enactment, and shall include a regulation made as a rule under any enactment:
 "Rule."
- (49) "schedule" shall mean a schedule to the Punjab Act in which the word occurs:
 "Schedule."
- (50) "Scheduled District" shall mean a "Scheduled District" as defined in the Scheduled Districts Act, 1874:
 "Scheduled District."
- (51) "section" shall mean a section of the Punjab Act in which the word occurs:
 "Section."
- (52) "ship" shall include every description of vessel used in navigation not exclusively propelled by oars:
 "Ship."

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XIV of 1874.

- (53) "sign," with its grammatical variations and cognate expressions, shall, with reference to a person who is unable to write his name, include "mark", with its grammatical variations and cognate expressions :
- (54) "son," in the case of any one whose personal law permits adoption, shall include an adopted son :
- (55) "sub-section" shall mean a sub-section of the section in which the "Sub-section." word occurs :
- (56) "swear," with its grammatical variations and cognate expressions, shall include affirming and declaring in the "Swear." case of persons by law allowed to affirm or declare instead of swearing :
- (57) "vessel" shall include any ship or boat or any other description of vessel used in navigation :
- (58) "will" shall include a codicil and every writing making a voluntary posthumous disposition of property :
- (59) expressions referring to "writing" shall be construed as including references to printing, lithography, photography and other modes of representing or reproducing words in a visible form : and
- (60) "year" shall mean a year reckoned according to the British calendar.

General Rules of Construction.

3. Where any Punjab Act is not expressed to come into operation on a particular day, then it shall come into operation on the day on which the assent of the Governor-General is first published by the Lieutenant-Governor in pursuance of Sections 40 and 48 of the Indian Councils Act, 1861, and in every such Act the date of the first publication thereof shall be printed either above or below the title of the Act and shall form part of every such Act.

4. Where this Act or any Punjab Act repeals any enactment, then, unless a different intention appears, the repeal shall not—

- (a) revive anything not in force or existing at the time at which the repeal takes effect ; or
- (b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder ; or
- (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed ; or
- (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed ; or
- (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid ;

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act had not been passed.

5. In any Punjab Act, it shall be necessary, for the purpose of reviving, either wholly or partially, any enactment wholly or partially repealed, expressly to state that purpose.

Revival of repealed enactments.

6. Where this Act, or any other Punjab Act, repeals and re-enacts, with or without modification, any provision of a former enactment, then references in any other enactment or in any instrument to the provision so repealed shall, unless a different intention appears, be construed as references to the provision so re-enacted.

Construction of references to repealed enactments.

7. In any Punjab Act, it shall be sufficient, for the purpose of excluding the first in a series of days or any other period of time, to use the word "from," and, for the purpose of including the last in a series of days or any other period of time, to use the word "to."

Commencement and termination of time.

8. Where, by any Punjab Act, any act or proceeding is directed or allowed to be done or taken in any Court or office on a certain day or within a prescribed period, then, if the Court or office is closed on that day or the last day of the prescribed period, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards on which the Court or office is open :

Computation of time.

Provided that nothing in this section shall apply to any act or proceeding to which the Indian Limitation Act, 1877, applies.

XV of 1877.

9. In the measurement of any distance, for the purposes of any Punjab Act, that distance shall, unless a different intention appears, be measured in a straight line on a horizontal plane.

Measurement of distances.

10. Where, by any enactment now in force or hereafter to be in force, any duty of customs or excise, or in the nature thereof, is leviable on any given quantity, by weight, measure or value of any goods or merchandize, then a like duty is leviable according to the same rate on any greater or less quantity.

Duty to be taken *pro rata* in enactments.

11. In all Punjab Acts, unless there is anything repugnant in the subject or context,—

Gender and number.

(1) words importing the masculine gender shall be taken to include females ; and

(2) words in the singular shall include the plural, and *vice versa*.

Powers and Functionaries.

12. Where, by any Punjab Act, any power is conferred on the Local Government, then that power may be exercised from time to time as occasion requires.

Powers conferred on the Government to be exercisable from time to time.

13. Where, by any Punjab Act, a power to appoint any person to fill any office or execute any function is conferred, then, unless it is otherwise expressly provided, any such appointment may be made either by name or by virtue of office.

Power to appoint to include power to appoint *ex-officio*.

14. Where, by any Punjab Act, a power to make any appointment is conferred, then, unless a different intention appears, the authority having power to make the appointment shall also have power to suspend or dismiss any person appointed by it in exercise of that power.

Power to appoint to include power to suspend or dismiss.

15. In any Punjab Act, it shall be sufficient, for the purpose of indicating the application of a law to every person or number of persons for the time being executing the functions of an office, to mention the official title of the officer at present executing the functions, or that of the officer by whom the functions are commonly executed.

16. In any Punjab Act, it shall be sufficient, for the purpose of indicating the relation of a law to the successors of any functionaries or of corporations having perpetual succession, to express its relation to the functionaries or corporations.

17. In any Punjab Act, it shall be sufficient, for the purpose of expressing that a law relative to the chief or superior of an office shall apply to the deputies or subordinates lawfully performing the duties of that office in the place of their superior, to prescribe the duty of the superior.

Provisions as to Orders, Rules, etc., made under Enactments.

18. Where, by any Punjab Act, a power to issue any order, scheme, rule, form or bye-law is conferred, then expressions used in the order, scheme, rule, form or bye-law shall, unless there is anything repugnant in the subject or context, have the same respective meanings as in the Act conferring the power.

19. Where, by any Punjab Act, a power to make orders, rules or bye-laws is conferred, then that power includes a power exercisable, in the like manner and subject to the like sanction and conditions (if any), to add to, amend, vary or rescind any orders, rules or bye-laws so made.

20. Where, by any Punjab Act which is not to come into force immediately on the passing thereof, a power is conferred to make rules or bye-laws, or to issue orders with respect to the application of the Act, or with respect to the establishment of any Court or office or the appointment of any Judge or officer thereunder, or with respect to the person by whom, or the time when, or the place where, or the manner in which, or the fees for which, anything is to be done under the Act, then that power may be exercised at any time after the passing of the Act; but rules, bye-laws or orders so made or issued shall not take effect till the commencement of the Act.

21. Where, by any Punjab Act, a power to make rules or bye-laws is expressed to be given subject to the condition of the rules or bye-laws being made after previous publication, then, unless such Act otherwise provides, the following provisions shall apply, namely :—

- (1) the authority having power to make the rules or bye-laws shall, before making them, publish a draft of the proposed rules or bye-laws for the information of persons likely to be affected thereby;
- (2) the publication shall be made in such manner as that authority deems to be sufficient, or, if the condition with respect to previous publication so requires, in such manner as the Local Government prescribes;

- (3) there shall be published with the draft a notice specifying a date on or after which the draft will be taken into consideration ;
- (4) the authority having power to make the rules or bye-laws, and, where the rules or bye-laws are to be made with the sanction, approval or concurrence of another authority, that authority also, shall consider any objection or suggestion which may be received by the authority having power to make the rules or bye-laws from any person with respect to the draft before the date so specified ;
- (5) the publication in the Gazette of a rule or bye-law purporting to have been made in exercise of a power to make rules or bye-laws after previous publication shall be conclusive proof that the rule or bye-law has been duly made.

22. Where any Punjab Act is repealed and re-enacted with or without modification, then, unless it is otherwise expressly provided, any order, scheme, rule, form or bye-law, issued under the repealed Act, shall, so far as it is not inconsistent with the provisions re-enacted, continue in force, and be deemed to have been issued under the provisions so re-enacted, unless and until it is superseded by any order, scheme, rule, form or bye-law issued under the provisions so re-enacted.

Miscellaneous.

23. Sections 63 to 70 of the Indian Penal Code and the provisions of the Code of Criminal Procedure for the time being in force in relation to the issue and the execution of warrants for the levy of fines shall apply to all fines imposed under any Act, rule or bye-law, unless the Act, rule or bye-law contains an express provision to the contrary.

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24. Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence.

25. Where any Punjab Act authorizes or requires any document to be served by post, whether the expression "serve" or either of the expressions "give" or "send" or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

26. (1) In any Punjab Act and in any rule, bye-law, instrument or document, made under, or with reference to, any such Act, any enactment may be cited by reference to the title or short title (if any) conferred thereon or by reference to the number and year thereof, and any provision in an enactment may be cited by reference to the section or sub-section of the enactment in which the provision is contained.

(2) In any Punjab Act a description or citation of a portion of another enactment shall, unless a different intention appears, be construed as including the word, section or other part mentioned or referred to as forming the beginning and as forming the end of the portion comprised in the description or citation.

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